CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA

AT

NEW ORLEANS,

IN

NOVEMBER, 1882.

JUDGES OF THE COURT:

Hon. EDWARD BERMUDEZ, *Chief Justice.*

Hon. F. P. POCHÉ,
Hon. R. B. TODD,
Hon. C. E. FENNER,
Hon. THOS. C. MANNING,
} *Associate Justices.*

No. 7887.

MRS. B. W. LISSO ET AL. VS. NAVRA & OFFNER ET AL.

An action lies to recover a disputed claim from one of the partners of a dissolved firm, when it was placed as an indebtedness on the books of the firm, and such partner, by agreement with his co-partner, at the dissolution causes him to assume all the debts and liabilities of the partnership among which the claim figures.

The creditor in such a case, who makes himself party to composition proceedings in bankruptcy by the assuming partner, and grants him a discharge, on certain terms, is concluded and cannot recover from such debtor.

The provisions of a composition are binding, when confirmed, only on the creditors whose names and addresses and claims are shown in the debtor's statement produced at the meeting at which the resolution has been passed. The composition does not affect or prejudice the rights of other creditors who did not make themselves parties.

Payment of the claim by the first partner subrogated him to all the rights of the creditor against the second partner who assumed the debt. Judgment affirmed.

APPEAL from the Fifth District Court for the Parish of Orleans. *Rogers, J.:*

J. C. Egan and *O. N. Ogden*, for Plaintiff and Appellee.

W. S. Benedict and *J. P. Hornor*, for Defendants and Appellants.

Braughn, Buck & Dinkelspiel, on the same side.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff, as widow in community and as tutrix of her minor son, sues the defendants as a firm, and the members thereof *in solido*, as late partners, to recover a sum of money alleged to have been loaned the concern and used by it in its business.

The defenses are a denial of liability.

Offner pleads, that if the debt ever existed, it was extinguished by novation; that plaintiff has discharged him; that Navra has bound himself to pay all the liabilities of the firm, and is alone responsible for the debt. He calls Navra in warranty.

Navra pleads, that he is a discharged bankrupt, and is exonerated from all responsibility, as well towards the plaintiff as against Offner.

There was judgment in favor of plaintiff against Offner and in favor of Navra in the main demand, and in favor of Offner against Navra in the call in warranty.

The judgment is brought up for review, only so far as it affects Offner and Navra, as the plaintiff and appellee has asked no amendment.

I.

There can be no difficulty in fixing a liability against Offner. The evidence shows, that the amount was received by Navra, his partner, during the existence of the partnership, and that the plaintiff was recognized as a creditor for the same on the books of the firm. It also shows that, at the time of the dissolution of the partnership, the payment of all its liabilities, among which figured specially the debt due plaintiff, was assumed by Navra.

The burden then rested on the defendants to show a discharge from liability.

Offner says that Navra was plaintiff's agent; that Navra had control of her claim; that Navra released and discharged him therefrom, by returning to him the note which Navra & Offner had issued to represent it; that he, Offner, received and destroyed it, and that Navra made his individual note and delivered it to plaintiff, who accepted it, in place of that destroyed.

Offner also sets up, that plaintiff waived all recourse against him, by proving up her debt in the bankruptcy of Navra, as a debt without security.

Navra says that he made, in bankruptcy, a composition with his creditors, to which plaintiff assented, and that the discharge which he obtained in bankruptcy is likewise binding on Offner.

The evidence does not satisfy us that Mrs. Lisso ever authorized Navra to novate the claim against Offner & Navra. Novation is one of the modes in which obligations can be extinguished. R. C. C. 2130.

A special authorization to novate would have been necessary, R. C. C. 2997, and none was shown, whether oral or written. It is questionable whether the giving by Navra of his note to her, for the amount of the claim against the late firm, could constitute a novation which must be express, or surrounded by such circumstances that no doubt can be entertained touching the intention of the parties to change the character of the debt. R. C. C. 2190. Mrs. Lisso could have considered that the new note was nothing but an evidence of Navra's *acknowledged* liability to her for the entirety of the claim. It is not so clear that as tutrix she could have authorized Navra to novate the interest of the minor son in the debt. It does not appear, however, that she has done so.

We see no force in the other defense.

Plaintiff's claim could not be considered as a debt with security. It had never been secured by Navra, or even Offner, besides their responsibility as partners of the firm of Navra & Offner. Her conduct could not and did not deprive Offner of any of the rights which she might have had against Navra, had she not voted at the meeting. On payment to her of her claim, Offner will be fully subrogated to all her rights and entitled to enforce against Navra all the obligations which he incurred by assuming specially all the liabilities of the firm, among which is embraced that presently sued upon by plaintiff.

II.

As the plaintiff and appellee has not prayed for an amendment of the judgment against her, and in favor of Navra, we have no authority to inquire into its correctness.

III.

Offner is entitled to recover from Navra the amount for which he is held liable to the plaintiff, as a partner of the late firm of Offner & Navra. The latter had assumed payment of it by special contract with Offner. He has not discharged it and is responsible under the assumption.

The defense that the composition and discharge are binding on Offner cannot hold, as Offner was in no way made a party thereto, and not named in the proceedings for composition. That was essentially necessary.

The law is formal, that the provisions of a composition shall be binding on the creditors, whose names and addresses, and the amounts

due them, are shown in the debtor's statement, produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors. *Ex parte* Matthews, L. R. Ch. App. 307; Breslauer vs. Brown, 3 Appeal Cases, 672; 11 Rep. 412; 124 Mass. 497; 131 Mass. 457; 129 Mass. 519.

Finding no error in the judgment appealed from, it is affirmed, with costs.

No. 8631.

THE STATE OF LOUISIANA EX REL. E. A. LUMINAIS VS. THE JUDGES OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

A mandamus will not issue to compel the Judges of the Civil District Court of the Parish of Orleans to approve the salary now due of one of their officers, for a particular amount, when their refusal to thus approve is predicated on an act of the legislature reducing such salary twenty per cent.

The Judges could be compelled by mandamus to act on such an application; but not to act in a particular manner. To do so would be to divest them of their judicial discretion.

APPLICATION for Mandamus.

P. E. & C. J. Théard and *G. H. Théard*, for the Relator:

1. Act 21 of 1882, amendatory of Act 47 of 1880, makes it the duty of the Judges of the Civil District Court for the Parish of Orleans to approve the warrants for the salaries of the minute clerks, docket clerks and record clerks of said Court, when signed by the clerk. Mandamus is the proper remedy to enforce the performance of that duty. C. P. 829, 834, 830.
2. This Court, under Article 90 of the Constitution, has jurisdiction of this matter. 32 An. 549, 553, 719, 774, 1256; 33 An. 146, 180, 358, 832, 1201, 1381. There is no inferior tribunal to which relator could apply for redress.
3. Relator's salary is fixed by Act 130 of 1880 at eighteen hundred dollars per annum.
4. Act 108 of 1882, entitled "an Act to fix the salaries of all deputies and employees who are paid out of the Judicial Expense Fund," and purporting to reduce relator's salary twenty per cent., is violative of Articles 29 and 50 of the Constitution.
5. The object of Act 108 of 1882, is either "to amend Act 130 of 1880, and to reduce the salaries of the employees of the Civil and Criminal District Courts and Court of Appeals of the Parish of Orleans," or to amend Acts 130, 131, 115, 94 and 66 of 1880, and to reduce the salaries of all the employees who are paid out of the Judicial Expense Fund." Neither of these objects is expressed in the title. The law is unconstitutional. 4 An. 297; 5 An. 91, 94; 6 An. 605; 23 An. 720; 33 An. 63; Const. Art. 29; Cooley's Const. Lim. p. 141.
6. The effect of Act 108 of 1882 is to amend Act 130 of 1880 only. There is no clue to that in the title.
7. A law which purports to fix salaries by a reduction of twenty per cent. on amounts previously fixed by statutes which are not repealed, is in reality an amendatory law which should specify in its title the laws amended, and should re-enact and publish them at length as amended. The omission to do so makes the statute unconstitutional. Article 30, Const. of 1879.

The opinion of the Court was delivered by

POCHÉ, J. The Relator seeks by mandamus to compel the Respondents to approve his voucher, for his salary as docket clerk of the Civil District Court, for the month of August, 1882, at the rate of one hundred and fifty dollars a month.

Relator's salary had been fixed at $150, by Act 130 of 1880, and was reduced twenty per cent. by Act 108 of 1882, and the Judges' refusal to approve his voucher for the month of August last, for one hundred and fifty dollars, was predicated on the last mentioned act.

But Relator charges that said Act is unconstitutional, and avers that the plain ministerial duty of Respondents was to approve his voucher, in accordance with the provisions of the Act of 1880.

A compliance with Relator's demand would necessitate from Respondents a declaration of the unconstitutionality of Act No. 108 of 1882, and the mandamus which we are asked to grant in the premises must be preceded by such a declaration on our part.

In other words, we are asked by this proceeding to command Respondents to decide that Act No. 108 of 1882 is unconstitutional, null and void.

The record shows that Respondents have not failed or refused to perform the plain duty of approving Relator's voucher as required by law; but that they have refused to approve his voucher, for the reason that said voucher does not comply with the provisions of the law regulating the subject matter.

The mandamus which we would issue, at the instance of Relator, would not have the legal effect of compelling the Respondent Judges to perform the duty of approving a voucher for the salary of one of their officers, but would go to the extent of compelling them to judicially determine that the proposed object of the legislature to reduce such salary was illegal and of no effect. We are clear in our conviction, that we are powerless to grant any such relief, as this would be tantamount to our assuming original jurisdiction of the matter. We have frequently held that we were clothed with the power to compel the Judge of an inferior court to render a judgment, but that we were powerless to dictate to him what judgment he should render.

Thus, in the case of the State ex rel. Wise vs. Taylor, Judge, 32 An. 977, we declined to interfere with the judicial discretion of the inferior Judge who had refused to sign an order of seizure and sale, on the ground that his refusal was a judicial act, which could be reviewed by an appeal only.

In the case of the State ex rel. Ames vs. Judge, 32 An., (O. B. 53, p. 43,) not reported, we refused to compel the District Judge to homologate the proceedings of a family meeting; holding

that the Judge could be compelled to act on the petition for homologation of the proceedings, but could not be compelled to decide in a particular manner. See also, State ex rel. New Orleans vs. Judge, 32 An. 549; State vs. Judge, 5 Robinson, 161.

In the present case, the Judges of the Civil District Court could be compelled by mandamus to act on Relator's application for their approval of his voucher; but to compel their approval, when they have acted on the application, and have refused their approval, would be to dictate the judgment which they should have rendered, and such an act would divest them of their judicial discretion. State vs. Dunlap, 5 M. 271; State vs. Judge Second District Court, 13 An. 481; Same vs. Same, 13 An. 483; Same vs. Same, 15 An. 113; 15 An. 164.

If the performance of an act by a Judge, which must be preceded by and predicated on his conclusion on the alleged unconstitutionality of an act of the legislature, is not a judicial act, it would be difficult to conceive of an *ex-parte* order of a Judge which would fall under the definition.

Although these views have not been urged in defense by the Respondents, they forcibly present themselves at the threshold of this investigation, and lead to the inevitable conclusion that Relator has entirely mistaken his remedy.

The writ of mandamus herein prayed for is, therefore, refused, at Relator's costs.

CONCURRING OPINION.

FENNER, J. While approving the decree rendered in this cause, I cannot concur in the reasons assigned in the opinion of the majority of the Court.

I do not regard the action of the Judge, in discharging the function imposed on him by law, of approving the warrant of the clerk for his salary, as a *judicial* act, in the sense or spirit in which it is treated in the majority opinion.

Abbott defines "judicial," as "pertaining to the administration of justice in courts," "judicial authority," as "the official right to hear and determine questions in controversy," "judicial decision," as "the determination of a court or a judge in a cause."

Judicial discretion only arises in the exercise of judicial authority, which presupposes the existence of some cause or controversy submitted to the Judge for decision in the customary form of judicial proceedings.

It is manifest that the function imposed upon the Judge of approving the warrants of the clerk, as a condition precedent to their payment at the treasury, possesses none of the characteristics of judicial action in

the sense referred to. It contemplates no proceeding whatever in court, nor any record thereof in the court. It might be performed by the Judge at any time and anywhere, on the street, or even in a different parish or State, or country. If any controversy exists, it is solely between the clerk and the Judge himself.

The clerk has the absolute right to have his salary, as provided by law, paid; and it is the absolute duty of the Judge to approve his warrants therefor. When the clerk demands of the Judge the performance of this duty, and the Judge refuses, a controversy arises between the clerk and the Judge himself, which the Judge cannot determine for himself, but which the clerk has the right to refer, like other controversies, to the determination of competent judicial power. The Judge has no discretion in the matter, except that discretion which every man has to determine for himself, primarily, what are his rights and obligations; but if that determination be contested by the adverse claimant, in the exercise of a like primary liberty, the latter has the right to invoke a settlement of the controversy by the judicial power.

If these views be correct, however, the Relator herein must, nevertheless, be denied the relief sought at our hands, because we have no original jurisdiction of such a case, and for this reason, I concur in the decree.

I am not called upon to express any opinion as to whether a duty of this kind can be imposed by law upon Judges of the District Court, under Art. 92 of the Constitution. That question, and its bearing upon the rights of parties, should only be decided when properly presented.

No. 8620.

THE STATE OF LOUISIANA EX REL. NEW ORLEANS CITY RAILROAD COMPANY ET AL. VS. HENRY L. LAZARUS, JUDGE, ETC.

A *remittitur* entered after verdict and judgment does not affect the right of a party to appeal from such judgment.

The appellate court must be governed by the record of the proceedings duly authenticated, and no statement of the Judge of the Court where the proceedings were had, that such record is incorrect, after the same is on file in this Court, and no step taken to correct it, can prevail against the record itself.

Mandamus made peremptory.

APPLICATION for Mandamus.

Braughn, Buck & Dinkelspiel and *W. O. Hart*, for the Relators:

1. The sum demanded and not the judgment rendered determines the jurisdiction of the appellate court. 16 An. 430.

2. A case cannot be rendered unappealable by entering a *remittitur* after judgment. State ex rel. Orleans R. R. vs. Lazarus, Judge. Opinion Book 56, Folio 752.

T. M. Gill, for the Respondent:

1. The amount in dispute, and not the amount claimed, gives jurisdiction. Constitution 1879, Article 81.
2. When the amount in contest, or claimed, does not exceed $1000, exclusive of interest, the Court of Appeals has exclusive jurisdiction. 33 An. 358; see 32 An. 597 to 603, 929.
3. A verdict is not a judgment. Webster's and Bouvier's Dictionaries, and Blackstone's Commentaries.
4. Verdicts are without effect unless there be judgment. C. P. 541 *et seq.*; 4 N. S. 532, 533
5. *Remittitur*, reducing the amount in contest below appealable amount before judgment deprives this Court of jurisdiction. 21 An. 278, and authorities cited.
6. Verdict may be a reason for, but a reason for judgment is not the judgment, nor a part of the judgment. 10 An. 261, 640; 12 An. 736.

The opinion of the Court was delivered by

TODD, J. The Relators allege, substantially, that in a suit entitled Wm. Mattle vs. New Orleans City Railroad Company and F. Wintz, No. 4596, on the Docket of the District Court for the Parish of Orleans, Division E, there was a trial by jury, and a verdict rendered against them for $2,000, upon a demand for five thousand dollars.

That the verdict was recorded, and on the next day thereafter a judgment, in accordance with the verdict, was rendered by the court. That on the day following, the Relators filed a motion for a new trial, which motion was taken under advisement by the court, and on the 23d of May following, an order was entered, suggesting that if a *remittitur* of $1,000 was not made by the plaintiff in the suit, a new trial would be granted.

That a *remittitur* was then entered, and a new judgment was rendered, without notice to Relators, for $1,000, on the 25th of May, 1882. That after the signing of this judgment and within the legal delays, Relators asked for a suspensive appeal to this Court, which was refused by the Judge, on the ground that this Court was without jurisdiction *ratione materiæ*, to entertain the appeal, the amount in dispute not exceeding $1,000. Thereupon, the Relators applied for a *mandamus* to compel the Respondent Judge to grant the appeal.

The record presents a case precisely similar to that between the same parties, No. 8587, recently decided by this Court, in which the *mandamus* was made peremptory.

It is, however, urged by the Respondent Judge, that the record in the instant case is incorrect. That whilst in the previous case referred to, the *remittitur* was entered after judgment, in this case it was entered before judgment, but after verdict. He denies having rendered any judgment until after the *remittitur* was entered.

The *remittitur* was in these words:

"Now comes Wm. Mattle, the plaintiff herein, through his undersigned counsel, and only because required so to do by the court, and specially reserving all of his rights, and excepting to the right and ruling of the court to impose the *remittitur*, and enters the *remittitur* of one thousand dollars.

T. M. GILL,

Attorney for Mattle, Plaintiff."

The transcript before us is duly authenticated by the certificate of the clerk of the court, over which the Respondent presides, as containing a true record of the proceedings. We there find a judgment purporting to be a part of these proceedings, rendered on the verdict of the jury and for the amount allowed by that verdict, ($2,000) though not signed by the Judge. This was followed by a motion for a new trial. This shows that the *remittitur* was entered after judgment, as alleged by the Relators.

However great our confidence in any statement that might be submitted by a Judge, nevertheless our knowledge of the facts must be derived from the record, and we can only take cognizance of them as there shown.

As held in the case referred to, we think that the *remittitur* was entered too late to affect the Relators' right to appeal, even admitting that if entered before judgment, in the manner and form stated, it would have that effect, upon which we express no opinion.

It is, therefore, ordered, adjudged and decreed, that the *mandamus* asked for be made peremptory.

No. 7688.

STERN BROTHERS VS. GERMANIA NATIONAL BANK.

The purchaser or pledgee of negotiable instruments after maturity, whose rights are derived from one who was not the owner and who was not authorized to sell or pledge, acquires no title or right thereto or thereupon, as against the true owner. And this principle applies equally to public securities past due, such as coupons of State Bonds.

APPEAL from the Third District Court for the Parish of Orleans. *Monroe*, J.

Bayne & Denegre and *Semmes & Payne*, for Plaintiffs and Appellees:

"The sale of a thing belonging to another person is null." C. C. 2452.

This applies to past due obligations to pay money, as well as to other property. Bird vs. Cockrem, 28 An. Rep. 70; Henderson vs. Case, 31 An. Rep. 215; Texas vs. White, 7 Wallace Rep. 700; 21 Wallace, 143; 10 Wallace, 90; 14 Peters, 321; 99 United States Rep. 440; 26 An. Rep. 556; 13 La. Rep. 214.

Detached coupons past due are independent obligations which mature like other obligations bear interest after maturity and are subject to the rules of prescription applied to promissory notes. Conger vs. City of New Orleans, 32 An. Rep. 1255.

Jas. McConnell and *Braughn, Buck & Dinkelspiel*, for Defendant and Appellant:

1. Where the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title against an innocent third party who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner. McNeil vs. Tenth National Bank, 46 N Y. 325, 329, 333, 337, 339; Dos Passos on "The Law of Stock Brokers and Stock Exchanges," 611, 600; Moore vs. Metropolitan Bank, 55 New York, 41.
2. Where one of two innocent parties must suffer, the loss must remain upon the one upon whom it has already fallen. 6 An. 621; 21 An. 342; 4 An. 19.
3. Where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. Babcock vs. Lawson, English High Court, Q. B. Div. 27, W. R. 866; Mahan vs. Dubuclet, 27 An. 45; 7 An. 358; Walker vs. Cassaway, 4 An. 20-21.

The opinion of the Court was delivered by

FENNER, J. Plaintiffs entrusted to the late firm of A. Eimer Bader & Co., for collection merely, certain detached coupons of bonds of the State of Louisiana, said coupons being unconditional obligations of the State to pay to bearer certain sums of money, at dates specified therein, "being six months' interest on Consolidated Bond" of specified number. These coupons, long after their maturity, were pledged by A. Eimer Bader & Co. to the defendant, to secure a loan of $5,000 made to said firm.

Plaintiffs now sue to recover said coupons or their value.

There is no controversy as to essential facts, viz: that plaintiffs owned the coupons; that Bader & Co. had no authority from plaintiffs to sell or pledge them, and no other authority except to collect; that they were pledged by Bader & Co. for their personal debt, in which plaintiffs had no concern; and that said pledge was made long after the maturity of the coupons.

The authorities are quite unanimous and entirely convincing, that the purchaser or pledgee of negotiable instruments after maturity, whose rights are derived from one who is not the owner, and who is not authorized to sell or pledge, acquires no title or right thereto or thereupon, as against the true owner. C. C. 2452; Bird vs. Cockrem, 28 An. 70; Henderson vs. Case, 31 An. 215; Davis vs. Bradley, 26 An. 555; Foley vs. Smith, 6 Wall. 493; Texas vs. White, 7 Wall. 700; Vermilye vs. Adams, 21 *Id.* 143; Fowler vs. Brandy, 14 Pet. 321.

We have carefully considered the various grounds on which it is sought to except this case from the application of the above principle, viz:

1. It is urged that it does not apply to public securities, like those of a State. This objection is answered by the cases above quoted from 7 Wall. 700, 21 Wall. 143, and also by 10 Wall. 90, and 99 U. S. 440. We

have ourselves held, that detached coupons are independent obligations maturing like other obligations, bearing interest and prescriptible, like promissory notes, to which they are assimilated. Conger vs. New Orleans, 32 An. 1255.

2. It is claimed that the principle only applies when the past due paper has been protested. The fact of protest was an accident of the case in 31 An. 215; but in various others of the cases quoted, that circumstance did not exist, and its absence in no manner affects the principle. In 26 An. 556, it is said: "a negotiable instrument unpaid at its maturity shows, upon its face, that it was dishonored, etc."

3. The doctrine is invoked that where one of two innocent parties must suffer, the loss should fall on the one who enabled the third party to commit the fraud. This objection to the application of the principle now under discussion is not new. It has been made, considered and overruled, both by this Court and the Supreme Court of the United States. Foley vs. Smith, 6 Wall. 493; Bird vs. Cockrem, 28 An. 70.

4. It is finally urged, that by conferring upon Bader & Co. an apparent title or power of disposition, plaintiffs are estopped from asserting title against an innocent third person dealing with such apparent owner. It is evident that plaintiffs did nothing except put Bader & Co. in possession of the coupons for a legitimate purpose, which purpose could not have been effected without such possession. Like possession and like apparent ownership necessarily existed in all the cases quoted by us, otherwise the sale or pledge could not have been made. The authorities relied on by defendant rest on other and peculiar circumstances not necessary to be here stated.

In conclusion, it must be admitted that the principle invoked by us, in its application to transfers, not only of past due negotiable instruments but of all personal property, by the possessors and apparent owners thereof, undoubtedly exposes innocent dealers to great danger of fraud and wrong; yet there are many equitable considerations which weigh equally in its favor; and the law, as it exists, has been established, after a full and fair consideration of the equities on both sides. Arguments against its wisdom and propriety should be addressed to the legislative, not to the judicial discretion.

Judgment affirmed, at appellant's cost.

Rehearing refused.

No. 8372.

SUCCESSION OF PIERRE CLAVERIE.

A judgment cannot properly be rendered for more than is demanded.

The burden of proof is on the opponent, when he alleges assets beyond those acknowledged in the account.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe*, J.

Chas. Louque, for the Tutrix, Appellant.

A. J. Villeré, for the Opponent and Appellee.

The opinion of the Court was delivered by

MANNING, J. The widow Claverie, as tutrix of the decedent's minor children, rendered the account of her administration of his succession, which was opposed by Louis Golis, a mortgage creditor. Two items of his opposition were sustained by the lower court, viz: the rents charged to herself by the tutrix as $265 were increased to $785, and the widow's portion—one thousand dollars—which she charged as $950, fifty dollars having been received by her from the sale of the contents of a shop, was further reduced by $40, the proceeds of sale of household furniture also received by her.

The opponent avers, as to the item of rents, that they amounted, or should have amounted to over five hundred dollars, and prays that they be increased to that sum. The Judge went beyond the prayer, and charged the accountant with more than was demanded. A judgment cannot properly be given for more than is demanded. Morgan vs. McGowan, 4 Mart. 289; Barckley vs. Evans, 2 Mart. N. S. 241.

The property, from which the rental was derived, consists of three tenements, yielding $26 a month, and another worth $8 a month, occupied by the widow and children; but Mrs. Claverie proved that she had not received rent for fifteen months of the time charged by opponent and allowed by the court, and the opponent has not proved that she either did receive, or could have received, the rents for that time. The burden was upon him to show that the assets with which he sought to charge her were available. Deducting the rental of the three tenements for fifteen months, from the sum charged against her by the lower court, the rents with which she is properly chargeable are fixed at $395.

The widow's portion was properly reduced to $910, she having received and appropriated $90 of the assets of the succession.

Therefore, it is ordered and decreed, that the judgment of the lower court is amended by reducing the sum charged against the tutrix for rents to $395, and as thus amended, that it is affirmed, the opponent to pay the costs of appeal.

No. 7867.

PETER DELANEY AND WIFE VS. A. ROCHEREAU & Co.

The appellant, on the day the appeal was returnable, applied for and obtained an extension of thirty days to file the transcript: *Held*, that the additional delay granted by the Court, only commenced to run from the three judicial days allowed by the law after the return day.

Agents are not liable to third persons for non-feasance, or mere omissions of duty. They are responsible to such parties only for the actual commission of those positive wrongs, for which they would be otherwise accountable in their individual capacity, under obligations common to all other men. The doctrine, under the common and civil law, does not differ on that subject. Judgment affirmed.

APPEAL from the Fifth District Court for the Parish of Orleans. *Rogers*, J.

Jos. P. Hornor and *F. W. Baker*, for Plaintiffs and Appellants:

ON MOTION TO DISMISS.

1. The law grants three judicial days after the return day within which the transcript of appeal may be filed. C. P. 589 and 883; 1 Hennen Dig. Appeal VIII (d.) No. 3, p. 82.
2. The court may grant further time to file the transcript, but the time granted by the court are not judicial but running days, which begin only after the expiration of the delay granted by law. 33 An. 119.
3. An order of court granting farther time to file a transcript, which reads, "that the delay for filing the transcript of appeal herein be extended *for* thirty days," excludes the three judicial days allowed by law. If it had been intended to include them the language would have been "extended *to* thirty days."

ON THE MERITS.

1. Every one is bound to keep his buildings in repair, and is answerable for all damage occasioned by their fall, when caused by neglect to repair. C. C. Arts. 670, 2322; 7 An. 321; 14 An. 806; L. R. 10; C. P 658; 5 B. & S., 78; 10 Allen, 368; 9 Cent. L. J. 385.
2. An agent is liable under the civil law to third persons for damages resulting from his non-feasance, as well as mis-feasance. C. C. Art. 3003; Code Napoleon, 1992; Domat, P. 1, B. 1, T. 15, Sec. 3, Arts. 1 and 4; Story on Bailments, § 165; Story on Agency § 309; Shearman & R. on Negligence §§ 112 and 115; Evans Principal and Agent, p. 328; Wharton's Law on Negligence § 535; 12 Mod. 488; 28 Me. 463; 5 Gilm. 425; 30 Conn. 329; 98 Mass. 77; 30 N. Y. 78; 8 Barb. 358; 3 E. D. Smith, 591; 19 Wend. 343.
3. Whenever the agent's negligence directly injures a stranger, the agent having liberty of action in respect to such injury, then such stranger can recover from the agent damages for such injury. Wharton on Negligence, § 535; Harriman vs. Stowe, 57 Mo. 93; Beaugillot vs. Callemer, 33 Sirey, 322; C. C. 2315, 2316, 2317; Boston Beef Packing Co. vs. Stevens, 12 Fed. Rep. 279; 9 Com. Bench, 377.
4. It was not of contributing negligence in plaintiff's child to enter a building where a public dance and entertainment were being given, where such entertainments had been given before, and where an admission fee was charged, when invited by an older companion who paid his entrance fee.
5. A person entering a building under such circumstances, which is quietly in the possession of other persons, who have the apparent right to so use the building, and which has been so used before, is not a trespasser. 51 N. Y. 476.
6. It is the duty of owners of buildings to keep them in repair, and when vacant to keep them securely fastened or guarded.
7. A trespasser can recover for injuries wantonly inflicted, as by the fall of building from neglect to repair it.

8. Where the injured person is a child, recovery can be had, because a child cannot be considered as appreciating the danger, or bound to inquire by what authority the house is open and used. 83 Penn. 332; 86 Penn. 74; 17 Wall. 660; 4 Bing. 628; 1 Addison on Torts, § 260, p. 282; Shearman & Redfield on Negligence, § 504; 102 Mass. 572; 19 Conn. 507; 1 Q. B. 29; 2 Thompson on Negligence, § 39, p. 1192.

C. E. Schmidt, for Defendants and Appellees:

ON MOTION TO DISMISS.

The appeal in this case was made returnable on Monday, the 1st of March, 1880. On that day an extension of thirty days was granted for filing the transcript. This delay or extension expired on the 31st of March, 1880. The transcript was not filed until the 2d of April, 1880. This was too late. 32 An. 28; 28 An. 901; 24 An. 333, etc.

The motion to dismiss for such a cause is not required to be made within three days of the filing of the transcript. It may be made at any time, at least before the case has been fixed for trial. 4 An. 359; 9 An. 21; 10 An. 75.

ON THE MERITS.

The line of a man's private domain, like the boundary line between nations, is not to be crossed without permission. Cooley on Torts, p 302

There is no duty owing to a trespasser from the owner of the property upon which he intrudes. Cooley on Torts, p 660; Wharton on Negl., § 351; Sourdat, de la Responsabilité, Vol. 2, p. 21.

At common law the general rule is, that an infant is responsible for his torts, as any other person would be. Cooley, p. 103. And, in respect to trespasses, there is no exception in the law in favor of minors. Sikes vs. Johnson, 16 Mass., 389.

Our Code expressly declares that "the obligation arising from an offense or quasi offense is binding on the minor." Rev. C. C., Art. 1785; and further provides that "he (the minor) is not restituable (cannot be relieved) against the obligations resulting from his offenses or quasi offenses." Rev. C. C. Art. 2226.

As said by Rogron, under Art. 1310 C. N., offenses and quasi offenses are all those unlawful acts which cause damage to others. *Offense* (délit), when there was the intent to injure; *quasi offense* (quasi-délit), when no such intent existed.

A trespass may be intentional or unintentional. Cooley, p. 438.

If intentional, it is an offense; if unintentional, a quasi offense. In neither case is the minor relievable there against.

Even if the plaintiffs' son had been a licensee, no right of action would have accrued against defendants; for, no duty is owed to a mere licensee, and he has no cause of action for negligence in the place he is permitted to enter. Parker vs. Portland Publishing Co., Cent'l Law J., Vol 9, p. 108.

In an action like this, for negligence, the evidence must be confined to the time and place and circumstances of the injury, and the negligence then and there; but what occurred to others, at other times, more or less remote, is collateral and inadmissible. *Ibid.*

It was clearly not the mere alleged state of decay of the gallery, but the act of the trespassers, that caused its fall, and therefore plaintiffs cannot recover, for, *causa proxima, non remota spectator*. Cooley, pp. 68 to 70; Wharton on Agency, § 380; Wharton on Negl., §§ 134, 137.

The evidence tends to show that the gallery was sufficiently strong for usual and ordinary purposes, but that, both on the night of this accident and a week before, it had been subjected by trespassers, to such extraordinary pressure by their rushing out in great numbers to its front railing, as eventually to wrench out of their sockets in the brick wall the iron bars which formed its chief support.

At common law, the doctrine is well settled that no agent, except the master of a ship, is ever liable to third persons for his own non-feasances or omissions of duty in the course of his employment, or, in other words, for his failure to perform the obligations of his principal. Story on Agency, §§ 308, 309; Ewell's Evans on Agency, pp. 437, 438, and the latter portion of Chapt. IV; Shearman & Redf. on Negl., 3d ed., §§ 111, 112.

And the same doctrine seems to obtain in the civil law, which holds that agreements have effect only on the contracting parties; they do not prejudice third persons. La. Code of 1808, p. 270, Sec. 6 of Chap. 3d of title III, Art. 65. See, also, p. 264 of Amendments to that Code by the framers of the Code of 1825; C. N. Art. 1165. Accordingly, the Court of Cassation, in the case of Thomassin vs. Gatouillat, decided on the 27th July, 1869, (Dalloz, J. G. 1869, p. 1, p. 350). that the responsibility of the mandatory for the consequences of his neglect in the course of his employment, could only be invoked by the mandator, and not by third persons.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. This motion is on the ground that the transcript was not filed in time.

The appeal was made returnable on the first Monday in March, 1880, being the first day of that month.

On that day the appellant applied for further time to complete the transcript, and on this application an order was made "that the delay for filing the transcript of appeal herein be extended for thirty days."

The delay granted by law for the filing of the transcript was the time intervening between the date of the order and the return day and three days added thereto; C. P. 589, 883; that is, three days after the return day; and within these three additional days, the delay could not have expired and the transcript could have been filed without any extension by order of Court.

Under the order of extension made, the transcript could have been filed at any time within thirty days, beginning from the last point of time within the original delay, that is, within thirty days running from the last day of grace, determinable by the original order. The transcript was filed on the 2d of April, within less than thirty days from such point of time, and was, therefore, seasonably filed. The 6th of March was the first day of the additional delay granted by the order, and the 4th of April was the last day. The law gave the appellant the first delay mentioned, and the thirty days additional were granted him by the Court.

The motion to dismiss is, therefore, denied.

DISSENTING OPINION.

BERMUDEZ, C. J. On the 1st of March, 1880, the day on which this appeal was made returnable, the appellants, producing a certificate of *that date*, from the clerk of the lower court, to the effect that a delay of thirty days was necessary to complete the transcript of appeal—obtained here, on motion, an order "that the delay for filing the transcript of appeal herein be extended *for* thirty days."

The transcript was filed on the 2d of April following. On the 18th

of March last, 1882, a motion to dismiss was made, on the ground that the transcript was filed after the expiration of the extension and, therefore, too late.

The appellants contend that the thirty began running, not on the 1st of March, but on the 5th of March, because it is *then* that the third judicial day following the return day, which was the 1st of March, expired, and that they consequently had until the 4th of April to file the transcript.

The thirty days which the appellants wished, applied for and obtained, were the thirty days required, not by them, but by the clerk, to complete the transcript. The certificate of that officer, dated the 1st of March, shows that "a delay of thirty days is necessary." The clerk meant and virtually said, thirty days, to be reckoned from the 1st of March.

Whether the application for further time be made on the very return day or within the three judicial days following it, is immaterial, provided it be made before the expiration of the last day.

The extension allowed is simply an expansion of the delay of grace, whether it has not begun to run at all, or has run in part, to the last day of the "further time" allowed. 28 An. 901; 32 An. 28, 801.

The argument that by ordering "that the delay for filing the transcript of appeal herein be extended for thirty days," the Court has enlarged the time allowed by law, by thirty days, has no force. It does not take this case out of the operation of the jurisprudence on that subject, for there is not one instance, in which further time was allowed, in which the same argument could not be made. What becomes, then, of the adjudications which have computed the delay allowed from the day on which it was asked? Ruling to maintain the appeal simply sets them at naught.

The transcript should have been filed on the last of the thirty days, that is, on the 31st of March. Filed two days subsequently, it came too late. 32 An. 28; 28 An. 901; 24 An. 333, and unreported cases.

The motion to dismiss, though made long after the 31st of March, 1880, was in time.

Appellees cannot be held to constant vigilance after the legal delay has passed, in watching, day by day, the docket, to see at what time the negligent appellant will file the transcript.

"A party who neglects to file the transcript seasonably, will be considered as having abandoned his appeal." 3 L. 251; 4 An. 350; 9 An. 21; 10 An. 75.

The argument that the delay was extended FOR, and not TO thirty days, may be ingenious, but it attempts a distinction without a difference, and reduces itself to a mere play upon words.

When "*further time*" is allowed by this Court, under Article 883, C. P., to bring up the transcript, the extension granted is to be computed from the day on which it is asked.

The authorities to which our attention has been called by appellants, and which have received it, do not support the specious theory invoked.

I think that the appeal should be dismissed.

POCHÉ, J. I concur in the dissenting opinion of the Chief Justice.

ON THE MERITS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to hold agents liable to third parties for injury sustained in consequence of an alleged dereliction of duty, or non-feasance, on their part.

The plaintiffs sue to recover $25,000 as damages, for great bodily injuries and suffering, resulting in the death of their minor son, occasioned by the giving way, in September, 1879, of the gallery of a house in this city, owned by a non-resident, but, at the time, in the possession and under the control and administration of the defendants, as his paid agents.

The defense was a general denial.

From a judgment in favor of the defendants, the plaintiffs have appealed.

The evidence shows the following facts:

The house in question and the adjoining one, both under the same roof, belonged at the time to Denis Coutreaud, who then resided in France. A. Rochereau & Co., the defendants, were his agents, having control as such of the property. Half of the property was rented and occupied. The other half was not rented and was vacant. There was in front of the entire building, which was two-story, a balcony, as wide as the sidewalk. It needed repairs. The defendants knew of its condition. The vacant tenement had been permitted by the agents, on two or more occasions not long before the calamity, to be used for purposes of amusement. On the 13th of September, a party, a raffle and a dance, was given in the unoccupied portion of the building, without the authority or knowledge of the defendants, by an individual, who had procured a key from a neighbor and taken possession of the premises. He gave the entertainment in the upper story, charging an admission fee. The son of plaintiffs, an intelligent lad thirteen or fourteen years old, and a girl, in whose company he kept, on payment of the fee, obtained entrance. There were from thirty to thirty-five persons at the party. At about half-past ten o'clock in the night, a number of persons, twelve or thirteen, among whom was

young Delaney, moved, it is inferred *rushed*, to the gallery, and were upon it when it gave way, and all who were on it fell with it. The young man was found unconscious on the sidewalk, with iron braces and some flooring upon him. He was removed from the spot to his home. The injuries received consisted in a concussion of the brain and fractures of the parietal and occipital bones of the skull, as well as bruises on the arms and legs. He is said to have been insensible to the end. He received all possible surgical and other attention, but died early in the morning.

The contention is, that as the injuries received caused intense suffering, and as they were occasioned by the falling of the gallery, which was in very bad condition, to the knowledge of the defendants, who, as the agents of the owner, were bound to keep it in good order, and who without justification neglected to do so, their firm and each member thereof are responsible *in solido* for the damages claimed.

The theory on which the suit rests is, that agents are liable to third parties injured, for their non-feasance.

In support of that doctrine, both the common and the civil law are invoked.

At common law, an agent is personally responsible to third parties for doing something which he ought not to have done, but not for not doing something which he ought to have done, the agent, in the latter case, being liable to his principal only. For non-feasance, or mere neglect in the performance of duty, the responsibility therefor must arise from some express or implied obligation between particular parties standing in privity of law or contract with each other. No man is bound to answer for such violation of duty or obligation except to those to whom he has become directly bound or amenable for his conduct.

Every one, whether he is principal or agent, is responsible directly to persons injured by his own negligence, in fulfilling obligations resting upon him in his individual character and which the law imposes upon him, independent of contract. No man increases or diminishes his obligations to strangers by becoming an agent. If, in the course of his agency, he comes in contact with the person or property of a stranger, he is liable for any injury he may do to either, by his negligence, in respect to duties imposed by law upon him in common with all other men.

An agent is not responsible to third persons for any negligence in the performance of duties devolving upon him purely from his agency, since he cannot, *as agent*, be subject to any obligations towards third persons other than those of his principal. Those duties are not imposed upon him by law. He has agreed with no one, except his principal, to

perform them. In failing to do so, he wrongs no one but his principal, who alone can hold him responsible.

"The whole doctrine on that subject culminates in the proposition that wherever the agent's negligence, consisting in his own wrong doing, therefore in an act, *directly* injures a stranger, then such stranger can recover from the agent damages for the injury." Story on Agency, 308, 309; Ib. on Bailments, 165; Shearman & Redfield on Negligence, 111, 112, Ed. 1874; Evans on Agency, notes by Ewell, 437, 438; Wharton on Negligence, 535, 78, 83, 780.

It is an error to suppose that the principle of the civil law, on the liability of agents to third persons, is different from those of the common law. It is certainly not *broader*.

While treating of "negligence in discharge of duties not based on contract," which had not previously been considered, Wharton, beginning the third book of his remarkable work on Negligence, says:

The Roman law in this respect rests on the principle that the necessity of society requires that all citizens should be educated to exercise care and consideration in dealing with the persons and property of others. Whoever directly injures another's person or property by the neglect of such care, is in *culpa* and is bound to make good the injury caused by his neglect. The *general* responsibility is recognized by the Aquilian law, enacted about three centuries before Christ, which is the basis of Roman jurisprudence in this relation. *Culpa* of this class consists mainly in commission, *in faciendo*. Thus, an omission by a stranger to perform an act of charity is not *culpa;* it is *culpa* however to inadvertently place obstacles on a road, over which another falls and is hurt; to kindle a fire by which another's property may be burned; to dig a trench which causes another's wall to fall. He subsequently states that the following are cases in which no responsibility can possibly attach:

"When a man does everything in his power to avoid doing the mischief, or when it is of a character utterly out of the range of expectation, the liability ceases and the event is to be regarded as a casualty.

"If the injury is due to the fault of the party injured, the liability of the party injuring is extinguished.

"*Quod quis ex sua culpa damnum sentit, non intelligitur sentire.*" *Pomponius.* Wharton, 780, 300.

The allusion made by certain writers to the Roman law, which gives a remedy in all cases of special damages, must necessarily be understood as referring to instances in which the wrong or damage is done, or inflicted by an actual wrong doing or commission of the injuring party.

The Article of the French Code, 1992, from which Article 3003 of our R. C. C. derives, which is to the effect that the agent is responsible not only for unfaithfulness in his management, but also for his fault and mistake, contemplates an accountability to the principal only, and this by reason of the assumption of responsibility by the acceptance of the mandate. How, indeed, can an agent be responsible to a third person for the *management* of the affairs of his principal, or for a *mistake* committed in the administration of his property? The responsibility for *fault* is likewise in favor of the "*mandant*" alone.

The Napoleon Code, Art. 1165, contains the formal provision that agreements have effect only on the contracting parties; they do not prejudice third parties, nor can they avail them, except in the case mentioned in Article 1121. This last Article refers to stipulations in favor of *autrui*, which become obligatory when accepted.

The Code of 1808 contained a corresponding article, but that of 1825 did not; neither does the Revised Code of 1870. It must not be concluded, however, that the omission to incorporate the provision in the subsequent legislation must be considered as a repudiation of the doctrine.

The distinguished compilers and framers of the Code of 1825 account for the omission to reproduce, because the provisions were already embodied in other Articles, and might be deemed to be exceptions to the undoubted rule that contracts can only avail, or prejudice the parties thereto. Projet du Code de 1825, p. 264.

Quod inter alios actum est, aliis neque nocet, neque prodest. § L. 20, De instit. Act; see also, Pothier on Oblig., Nos. 85, 87; Domat, L. 1, t. 16, Sec. 3, No. 8; L. 2, t. 8; Troplong Mand., No. 510; Duranton 10, No. 541; Toullier 6, 341; Toullier 7, 252, 306; Demolombe 25, No. 38; Laurent 10, No. 377; Larombière, 1, 640.

That such is the case was formally recognized by the Court of Cassation of France, in the case of Thomassin, decided in July, 1869, and reported in Part 1 of Dalloz J. G. for that year. The *syllabus* in the case is in the words following:

"Le mandataire n'est responsable des fautes qu'il commet dans l'exécution du mandat, qu'envers le mandant."

See also, J. G. Vo. Obl., Nos. 878 *et seq.*, and Vo. Mandat, No. 213.

The case of Beaugillot vs. Callemer, 33 Sirey, 322, far from expounding a doctrine antagonistical to that prevailing, as was seen, at common law, and which we consider as well settled likewise under the civil law, is fully confirmatory of the same.

It was the case of an agent condemned to pay damages for obstructing, by means of beams, a water course partly closed up by masonry, and thus causing an overflow, in consequence of which a hay crop was

damaged. The plea of *respondeat superior* did not avail. The Court well held that the *commission* of the act constituted a *quasi* offense, in justification of which the mandate could not be set up.

This anterior view of the case relieves the Court from the necessity of passing upon the other questions presented, relative to *fault, trespass, contributory negligence, suffering and damages.*

Judgment affirmed with costs.

No. 8365.

SUCCESSION OF LOUISE E. CLAY, WIFE OF CHARLES FLORY.

A vendor's privilege on an immovable must be enforced, even when the act creating it was not recorded on the day that the contract was entered into, if no other creditor has acquired a mortgage on the property affected thereby. As to all other third persons, the privilege is valid from the date of the recording of the act creating it. Judgment affirmed.

APPEAL from the Civil District Court, for the Parish of Orleans. *Rightor*, J.

Braughn, Buck & Dinklespiel and *Jme. Meunier*, for Opponents and Appellees.

A. J. Villeré, for the Administrator, Appellant.

The opinion of the Court was delivered by

POCHÉ, J. In his account of administration, the administrator ignored the vendor's privilege securing the notes held by Lêche and Bouny, on the ground that the contract creating the privilege was not recorded on the day that it was entered into, and he has taken this appeal from a judgment enforcing the privilege claimed by said creditors, who had opposed his account.

The record shows that no other mortgage existed or was claimed against the property burdened with the mortgage, and vendor's privilege held by opponents Lêche and Bouny, and hence the administrator erroneously construes Article 3274 of the Civil Code, which reads as follows:

"No privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. It shall confer no preference on the creditor, who holds it, over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded on the day that the contract was entered into."

The article provides two distinct remedies. In the first part, it destroys the effect of privileges as to third persons, if they have not been recorded in the manner required by law.

In the second part, it provides that even when recorded, privileges can confer no preference over creditors who have acquired a mortgage, unless the registry was made on the day that the contract was entered into.

The article must be construed with reference to the preceding Article, (3273) which provides that privileges are valid against third persons, from the date of the recording of the act, or other evidence of indebtedness, as provided by law.

Hence, it follows, that in a contest between the holder of a privilege and other persons who have *not* acquired a mortgage, whether they be themselves privilege creditors or not, the privilege will affect such third persons from the date of its registry, whether it was recorded on the day that the contract was entered into or not. But as to creditors who *have acquired a mortgage*, and to them alone, it is sacramental, that the privilege should have been recorded on the very day that the contract was entered into.

The failure to record the privilege on the day that it was created, does not *destroy* it as to third persons, but it destroys the preference contemplated by law, over other creditors who have acquired a mortgage. Gay vs. Bovard, 27 An. 290. Appellant confidently relies in support of his position on the decision in the case of the Succession of Marc, 29 An. 412; but we find no relief for him in that opinion.

In that case the contest was between Gayarre and Soye, both mortgage creditors; and it was held that Gayarre's privilege resulting from an act of sale, which had not been recorded on the day that it had been passed, could confer no preference to him over Soye, who held a mortgage of anterior date, and of anterior registry, and it was correctly held, that "as against mortgages recorded anterior to the registry of the privilege, this latter has effect as such only when recorded on the day of the date of the contract creating it."

In the present case there is no contest between the holder of the privilege and a mortgage creditor; and the District Judge has correctly held that opponents' vendor's privilege must take rank and have effect as such from the date of its registry. Appellees have filed a motion for an amendment of the judgment in some minor particulars, but as they are silent on the subject in their brief, we consider the motion as abandoned, especially as we see no error in the judgment of the District Court.

Judgment affirmed.

No. 7551.

MISS LIZZIE DICKSON VS. JOHN CHAFFE & SONS.

1. Bills of lading taken by a consignor in his own name and held by himself, establish no title in the consignor, which he did not possess without them.
2. The bailee of goods who has fully and in good faith accounted to his bailor therefor, cannot be held responsible by third persons of whose adverse claims he was not notified.

APPEAL from the Fifth District Court for the Parish of Orleans. *Rogers*, J.

W. S. Benedict, and *Jos. P. Hornor*, for Plaintiff and Appellant.

Bayne & Denègre, for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. Plaintiff shipped on the Steamer Joe Bryarly, thirty-four bales of cotton, consigned to Octave Hopkins of New Orleans, and received bills of lading therefor.

The sheriff of Caddo Parish, in execution of a writ issued by the District Court of the Parish of Bossier, in a suit entitled Hamilton & Co. vs. Mrs. Dickson, seized the cotton, took possession thereof, and subsequently shipped the same on the steamer "Ashland," consigned to John Chaffe & Sons, under bill of lading taken in his own name, as sheriff. Chaffe & Sons received the cotton in due course, sold the same, and on the demand of the sheriff, consignor, paid over the proceeds to him, and took his receipt therefor, having no notice of any adverse claim.

Plaintiff brings the present action to recover said proceeds from Chaffe & Sons.

She has evidently mistaken her remedy, which is against the sheriff or the seizing creditors.

She says she was the owner of the cotton. Admit it. She says it was wrongfully seized under a writ commanding the seizure of the property of a different person. Admit that. Chaffe & Sons were, in no manner, parties to, or responsible for this wrong. The cotton was consigned to them by the sheriff. They received and held it for the sheriff. They sold it by his orders, and paid over to him the proceeds. In these acts they performed only their clear legal duties. Plaintiff says they knew the cotton had been originally shipped in her name and that she held bills of lading for it.

The record does not clearly establish this; but, if it were true, that would not establish even that the sheriff was a wrong-doer. The bills of lading, remaining in her own hands and not transferred to third persons, established no ownership in her, which she did not possess

without them, and left the cotton subject to the seizure of her creditors, or of any creditors of the true owner.

She says the law informed Chaffe & Sons that a sheriff has no right to ship cotton under seizure out of his jurisdiction or to sell the same there. *Non constat*, however, that the sheriff might not have had the authority of the court and the parties to do these things. And what right had Chaffe & Sons to question his authority? The cases of Holliday vs. Hamilton, 11 Wallace 565, and "The Idaho," 3 Otto 575, strenuously relied upon by plaintiff's counsel, have no application to this question.

The first was a suit by the transferree of bills of lading *against the seizing creditor*, for wrongful seizure, the very action appropriate here.

The other case is too inapplicable to require comment. Neither, in any manner, controverts the legal truism that the bailee of goods who has, fully and in good faith, accounted to his bailor therefor, cannot be held responsible by third persons, of whose adverse claims he was not notified. Cooley on Torts, p. 456; Story Bailm. 8th ed. §§ 266, 450, 582.

Judgment affirmed.

No. 8579.

THE STATE OF LOUISIANA VS. JACOB G. DISCH.

A verdict must be responsive to the indictment. So where a person is charged with burglary and the jury return a verdict of guilty of trespass, the Judge does not err in sending the jury back to the jury room in order that they may render a legal verdict. The verdict of trespass was not responsive to the charge of burglary. And the Judge may refuse such verdict, though he may have erroneously instructed the jury that such a verdict could be returned, and may correct his error.

Where an indictment for burglary contains two counts, charging respectively a higher and lower grade of the offense, and the jury are instructed that if they find the accused guilty, they must return a verdict of "guilty of first count," or 'guilty of second count" as the case may be, and in disregard of such instruction they return a general verdict of guilty, the Judge is authorized to refuse to receive such verdict, and a final verdict of "guilty of second count," rendered after again retiring, will not constitute such an irregularity as to vitiate the sentence upon it. Judgment affirmed.

APPEAL from the Seventh District Court, Parish of Catahoula. *Elam*, J.

J. C. Egan, Attorney General, for the State, Appellee:

1. The act of the Judge *a quo*, in referring the case back to the jury for their consideration when they have brought in a verdict not responsive to the charge, is legal and correct
2. A verdict for trespass cannot be found against a party charged with breaking and entering.
3. Objection to the competency of a juror should have been made when he was presented. It is too late to raise such objection in a motion for a new trial. 26 An. 383.

4. An indictment will not be set aside for duplicity when the crimes charged in the various counts are kindred, growing out of the same act. 30 An. 61.

D. B. Gorham, for Defendant and Appellant:

ON MOTION TO RECORD VERDICT OF TRESPASS.

A verdict may be recorded *nunc pro tunc* at a subsequent term. 3 Wharton 3192.

The crime of trespass is included in that of burglary. There cannot be a burglary without a trespass.

A verdict of trespass is responsive to the charge of breaking and entering in the first count of the indictment; the question of actual breaking being a fact for the jury to consider.

The term breaking, being more comprehensive, includes the terms deface or injure, in Section 827, R. S.

A verdict of trespass is an acquittal of the burglarious charges, and the accused is entitled to the same as a matter of right.

The court cannot set aside a verdict that acquits the accused. 2 Hawkins, c 47, Section 12.

ON MOTION FOR NEW TRIAL.

The court erred in refusing to receive the verdict of trespass, which is responsive to the charge of *breaking* in the first count.

The refusal of the court to receive the verdict of trespass had an improper influence on the minds of the jury.

A verdict of trespass, being an acquittal of the felony, the court was without authority to send the jury back to reconsider their verdict. 2 Hawkins, c. 47, Sections 11 and 12.

After the verdict of guilty was recorded, by direction of the court, it could not be altered or amended in any substantial degree. 2 Hale, P. C. 300; 3 Vol. Graham & Waterman on New Trials, p. 1406.

The verdict of guilty being uncertain, the court should have ordered a new trial. 5 An. 330.

ON ARREST OF JUDGMENT.

An indictment containing two counts, upon which *similar* judgments cannot be rendered, is fatal for duplicity. 20 An. 145.

Two counts, which are contradictory to and inconsistent with each other, cannot be joined in the same indictment. 15 An. 621.

The verdict of guilty, having been recorded by direction of the court, cannot be set aside by the court, and being inconsistent, is null. Hilliard on New Trials, p. 117, § 29; 3 Graham & Waterman on New Trials, p. 1406.

ASSIGNMENT OF ERROR.

The judgment of *guilty as charged*, is not responsive to the third verdict of "guilty of the second count."

The terms *guilty of burglary* convey no idea of the crime committed by the accused, nor of the penalty he should suffer, and none can be inflicted under such a judgment.

A judgment not responsive to the verdict is null 3 Graham & Waterman on New Trials, p. 1386.

The opinion of the Court was delivered by

TODD, J. The defendant was indicted for burglary, was tried, convicted, and sentenced to imprisonment at hard labor for three years, and to pay a fine of $250 and costs, and from this sentence has appealed.

There were two counts in the indictment. The first charged the defendant with the felonious entering and breaking into a storehouse in the night time; and the second count charged the felonious entering in the night time, without breaking.

The jury first brought in a verdict of guilty of trespass, having been previously instructed by the Judge presiding, that this was one of the verdicts they could render in the case. The Judge refused to permit the verdict to be recorded, and stated to the jury that he had erred in charging them that they could return such a verdict, and then instructed them that they could only find the following verdicts: "Guilty under the first count," "guilty under second count," or "not guilty," and sent them back to the jury room for further deliberation.

The jury thereupon retired, and again returning, brought in a verdict of "guilty as charged." This verdict the Judge first directed to be recorded, but immediately countermanded the order, not, however, before the clerk had recorded it, it appearing from the bill of exceptions that the clerk had written down part of the verdict before receiving the order to record. The Judge refused to have this verdict announced, and again directed the jury to retire. They did so, and in a short time returned with a verdict of "guilty of second count." This verdict was recorded and the jury discharged.

The proceedings relating to these last two verdicts and the refusal of the Judge to receive the first one, are charged as being irregular and illegal, and bills of exceptions were taken to them, and they were made grounds of motions for new trial and in arrest of judgment.

1. That the proceedings were irregular is not to be denied, but after a close review of them, and examining the law bearing on the subject, we have arrived at the conclusion that the proceedings in question were not irregularities of so grave a nature as to vitiate the sentence or to deprive the accused of any substantial legal right.

A verdict must be responsive to the charge. This is essential. That the first returned was not so responsive, a reference to the statute relating to trespass, cited and relied on by defendant's counsel, makes apparent.

The accused was indicted for burglary; one count charging the felonious breaking and entering the storehouse, and the other, as before stated, the entering without breaking.

The Section referred to, relative to trespass, is as follows:

"Whoever shall wilfully, maliciously or wantonly injure or deface any dwelling house, storehouse, or other buildings, * * * shall be deemed guilty of a trespass," etc.

Where this verdict is not responsive to the charge, it is null, and the jury was properly directed to retire and bring in a legal verdict, and the fact that the Judge, through error, had instructed them that they could return such a verdict does not affect the question. 1 Archibald, 601, notes; Graham & W. New Trials, Vol. 3, p. 1378; 3 Parker Crim. Rep. 552.

2. The second verdict returned was equally unauthorized and defective. Two grades of the same offense, burglary, subject to different penalties, were charged respectively in two counts. The general verdict of "guilty," left it wholly uncertain of what charge the accused was convicted, whether of the highest or lowest grade of burglary. Whether the Judge could legally sentence the accused on such a verdict, the authorities are divided; but this much is certain, that none of them authorized him on a general verdict to impose the penalty for the lighter grade of the offense; and had the sentence then been passed, the accused must necessarily have received a severer sentence than was subsequently imposed, and the sending back of the jury and the refusal of the Judge to receive this verdict, was in interest of the accused and resulted to his advantage. The recording of this verdict, under the circumstances stated, was without legal significance.

3. There is no force in the objection to the indictment for duplicity and misjoinder of offenses, which is one of the grounds of the motion in arrest. The indictment was for burglary, and contained two counts, each charging a distinct grade of the offense. This was entirely regular.

4. Lastly, it is assigned as error that the sentence was illegal in this, that this sentence or judgment was signed by the Judge *a quo*, and recited, among the other reasons for judgment, that the jury, by their verdict, found the accused "guilty as charged;" that the sentence was inconsistent with such verdicts, which would have authorized only a sentence for the highest grade of the offense, and that the penalty imposed showed that the accused was sentenced for the lighter grade. It is not often that we are called on to listen to a complaint from an offender that his punishment was lighter than the law allowed, for this seems to be the drift and conclusion of the argument.

In point of fact, however, the record plainly discloses that the accused was convicted of the grade of burglary charged in the second count of the indictment. The verdict of record so declares, and the sentence itself, that is, the actual punishment inflicted, is in exact accordance with the verdict, and the grade of the offense of which the accused was found guilty; and no error in the recital of the proceedings, which usually precede the words defining or fixing the penalty imposed, and which recital is not essential, can vitiate or impair a sentence which the law and the record justified.

We find no error or irregularity in the proceedings entitling the party to relief.

The judgment is, therefore, affirmed.

No. 8542.

HENRY RENSHAW VS. G. W. STAFFORD, EXECUTOR. R. P. HUNTER, THIRD OPPONENT.

The third opponent claiming $1000 out of a larger fund to be distributed by the executor, this court has jurisdiction.

The professional services rendered in the premises by the third opponent, were in fact against the interests of the succession from which he claims payment of his fee. He is, therefore, not entitled to it.

APPEAL from the Twelfth District Court, Parish of Rapides. *Barbin*, J.

T. L. Bayne, Henry Renshaw Jr., J. G. White and *R. J. Bowman*, for Plaintiff and Appellant:

Whether this case be viewed as coming under the clause in the Constitution of 1879 of "the matter in dispute," or under the clause of "the fund to be distributed," the plaintiff's right of appeal is clear.

1. If it be regarded as falling under the clause of "the matter in dispute," it is settled beyond controversy that it is the plaintiff's demand that is the matter in dispute, and not the demand of third opponent. 31 An. 452; 30 An 623; 2 An. 190; 8 L. 167; 11 L. 462.
2. The Convention incorporated this clause from the Constitutions of 1868, 1852, 1845 and 1812, with a full knowledge of this construction of that clause, and sanctioned it by adopting it without change.
3. If it be viewed as coming under the clause "the fund to be distributed," whatever be the amount therein claimed, it is the amount of the fund to be distributed, and not the amount claimed by the opponent, that determines the jurisdiction.
4. The amount in dispute, or the amount of the fund to be distributed, give distinct and separate rights of appeal, and one cannot be made to infringe or cut off the right granted by the other.

ON THE MERITS

5. The suit of Renshaw vs. Stafford, Executor, et als., was a revocatory action. 6 An. 87; 11 L. 419; H. D 1030, Nos. 3 and 8.
6. The judgment in a revocatory action does not avail those not privies nor parties. 9 R. 28; 6 L. 540. It annuls only so far as the plaintiff is concerned. C. C. 1972; 6 An. 552. Therefore, the judgment did not return the property to the succession of Stafford, but ordered it to be sold to pay the plaintiff. Not being returned to the succession, its proceeds cannot be subject to the claims of the succession.
7. In whatever light this judgment be viewed, whether as returning or not returning the property to the succession, the plaintiff has a privilege superior to all others.
8. The services of third opponent are so interwoven with services rendered Mrs. Stafford, who was claiming the property as her own, that they cannot be separated, nor could they, in representing a claim so conflicting to the interest of the succession, enure to the benefit of the succession.

R. P. Hunter, propria persona.

The opinion of the Court was delivered by

BERMUDEZ, C. J. Hunter, the third opponent, claims to be paid exactly one thousand dollars out of the proceeds of the sale herein, which realized $12,500.

We have no jurisdiction over his case.

This is not a suit in which a fund is proposed to be distributed. It is one in which a matter in dispute, a sum of money, is exactly one thousand dollars.

The proceeds of the sale do not, under and by reason of the opposition, constitute a fund to be distributed by this Court.

The opponent claims no more than one thousand dollars. He did not arrest and could not have prevented the plaintiff in the exercise of his rights over the surplus of that sum, as the proceeds of the sale, and over which there was no contest below.

Under the pleadings, the question is simply: Whether the third opponent is or not entitled to be paid one thousand dollars or less.

If this Court could, by its judgment, order the distribution of a sum exceeding one thousand dollars, it could entertain jurisdiction, but under no conceivable contingency, can it order anything more than the payment to the third opponent of exactly one thousand dollars.

The proposition cannot be countenanced, that this Court is vested with jurisdiction over any claim for less than one thousand dollars, when sought to be paid out of the proceeds of a sale exceeding one thousand dollars, when the surplus is not a matter of contest.

The clear object of the Constitution was to clothe this Court with appellate jurisdiction in civil matters, only in such cases in which it could render a judgment directing or denying the payment or distribution of a sum of more than one thousand dollars, or when the matter in dispute exceeds that sum.

The phrase: "The Supreme Court shall have appellate jurisdiction when the fund to be distributed, whatever may be the amount therein claimed, shall exceed one thousand dollars, exclusive of interest," Const. Art. 81, cannot be construed so as to apply to a case like the present one, in which the Court cannot direct the distribution of a fund exceeding one thousand dollars.

The circumstances of this case are to be measured, in order to test the question of jurisdiction, by the first part of the Article under consideration, which provides that the appellate jurisdiction of this Court, in civil matters, shall extend to all cases where the matter in dispute shall exceed one thousand dollars. Art. 81, Const.

The claim of the opponent not being for more than one thousand dollars, and there being no fund to be distributed by the Court exceeding one thousand dollars, this Court has no jurisdiction over the case.

It is ordered and decreed, that the appeal herein be dismissed, with costs.

ON APPLICATION FOR REHEARING.

The opinion of the Court was delivered by

TODD, J. A careful examination of the authorities bearing on this point, satisfies us that we erred in our previous decree, dismissing the appeal for want of jurisdiction.

By Article 81 of the Constitution, this Court has jurisdiction "when the matter in dispute, or the fund to be distributed, whatever may be the amount therein claimed, shall exceed $1,000, exclusive of interest."

That part of the Article relating to the "fund to be distributed," was formulated to correspond with the jurisprudence on the subject, settled by a long line of decisions of this Court. These decisions we have diligently reviewed, and find that the question of jurisdiction on this point, in such cases, is controlled by the amount of the fund to be distributed; that *this* constitutes the object of dispute; that if the entire fund is claimed by one party, and that fund exceeds the amount required to give jurisdiction, that the jurisdiction vests, though only a part of that fund is claimed by the other party and that part is below the amount which, under other conditions, is necessary to give jurisdiction. In such a contest, it is considered that a question has arisen that involves the distribution of the *entire fund*, one side demanding the whole of it, and the other denying such right, leaving for decision how the fund is to be divided or how disposed of. The decisions are uniform in support of this view. 8 L. 167; 11 L. 462; 2 An. 190; 29 An. 327; 30 An. 625; 31 An. 453.

In a recent case decided by us, Succession of Duran, not yet reported, the majority of the Court did not think that the decisions above cited were applicable to that case, inasmuch as by the effect of a prior judgment, not appealed from, homologating the account and ordering the distribution of the fund wherein not opposed, the dispute had been restricted to a sum remaining much below the appealable amount.

Our previous decree, dismissing the appeal, should, therefore, be set aside.

The Chief Justice adheres to the original opinion dismissing the appeal.

ON THE MERITS.

The opinion of the Court was delivered by

TODD, J. The plaintiff brought a suit to cause to be annulled a tax sale of a plantation belonging to the succession of Leroy A. Stafford, and to have his mortgage recognized and made executory against the property.

The defendants in that suit were the executor of the estate, G. W.

Stafford, the widow of the deceased, Mrs. S. C. Stafford, the purchaser of the land at the tax sale, and several of her vendees of portions of the land sold by her after her purchase.

The tax sale in question was sought to be annulled, on the ground of fraud and certain illegalities in the proceedings. There was judgment annulling the sale and recognizing the mortgage of the plaintiff, and ordering the sale of the property to pay it. The property was sold and bought in by the plaintiff, Henry Renshaw, the mortgage creditor.

The defendants in the suit of nullity referred to, and to subject the property embraced in it to the payment of Renshaw's mortgage, were represented by R. P. Hunter, Esq., attorney-at-law. After judgment was rendered in the case, and pending proceedings for the sale of the property mortgaged, Mr. Hunter, by third opposition, claimed a superior privilege on the proceeds of the sale, over the mortgage creditor, for one thousand dollars, being the amount of his fee for defending the suit in question. From a judgment in his favor for $350, this appeal was taken.

The plaintiff resists the claim of the opponent mainly upon the ground that the services rendered by him were not for the benefit of the succession, but opposed to its interest. The object of the suit, as stated, was to annul a fraudulent and illegal tax sale, by means of which the succession had been stripped of almost its entire property. This attempt of a creditor to bring back the property into the succession and make it liable for his debt, was resisted by the executor of the estate and the purchaser at the tax sale, and others, to whom she had sold. In their resistance to this demand of Renshaw, the defendants were assisted and represented therein by the present opponent. It would naturally strike one, from this statement of the case, that the professional services of the opponent, rendered under such circumstances and upon such issues, were not for the advantage of the succession against which he now prefers the charge for his said services, but were really opposed to the succession, as they were in resistance to the effort to bring back the property illegally disposed of, to pay a debt of the succession. For such services, those who were opposing this attempt, were justly chargeable and should pay. It is true that in that suit prescription was pleaded against the creditor's demand, and was overruled. Conceding that this feature of the defense was intended for the benefit and protection of the succession, when we consider that it was doubtless interposed also for the protection of the illegal sale, and for the benefit and at the instance of those interested to maintain it, and considering the entire character of the action and the defense thereto, we cannot conclude that the opponent is entitled to a judgment against the succession, and a preference on the fund in question for any

amount. Should the plea of prescription be regarded as made for the sole benefit of the succession, yet the evidence does not enable us to separate this part of the defense from the rest, and make a separate valuation of the opponent's services exclusively on this point. For these reasons, we think the claim of the opponent should have been rejected.

This being the first decision on the merits, the opponent is not precluded from applying for a rehearing.

It is, therefore, ordered, adjudged and decreed, that our previous decree dismissing the appeal be set aside, and it is now further ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and that the demand of R. P. Hunter, opponent, be dismissed, at his costs in both Courts.

Rehearing refused.

No. 8626.

THE STATE OF LOUISIANA EX REL. V. ROTHANG VS. WM. VOORHIES, JUDGE OF THE SECOND CITY COURT OF NEW ORLEANS.

When, in an ejectment suit before a court of limited jurisdiction, the defendant alleges a lease for an amount beyond such jurisdiction, the court is not, on the mere allegation, bound to dismiss the suit. It has a right to inquire into the correctness of the averment. It is only where such lease is found to exist, that the court will desist from the case and dismiss it.

A prohibition does not lie in such a case to prevent the court from ascertaining whether the defense to the jurisdiction is, *in point of fact*, well founded or not.

APPLICATION for a Prohibition.

Jos. P. Hornor and *F. W. Baker*, for the Relator:

1. Whenever the monthly or yearly rent paid by the tenant, or the lease which he, *the tenant, shall allege to hold*, shall exceed the sum of $100, the District Court alone has jurisdiction of a suit for ejectment. Rev. Stat., § 2156.
2. The jurisdiction of the court in such a suit is determined, not by the lease which the landlord may set up, but by *the lease which the tenant shall allege to hold*. Same.
3. The Supreme Court has supervisory jurisdiction over the City Courts of New Orleans, and will, under writs of prohibition and certiorari, examine into the jurisdiction of such courts and the regularity of their proceedings. 32 An. 1185; 32 An. 555; 33 An. 923; State ex rel. Fernandez vs. Houston, 34 An. N. R.
4. The City Courts of New Orleans have no jurisdiction over a landlord's suit to eject a tenant, when the tenant excepts to the jurisdiction of such Court *ratione materiæ*, setting up a monthly or yearly lease exceeding $100.

The Respondent *in propria persona.*

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a prohibition, coupled with a *certiorari*.

The complaint is, that the City Judge, whose jurisdiction is limited to one hundred dollars, has exceeded the bounds thereof, in a suit for the expulsion of a tenant, who had *alleged* to hold a lease to the premises, the yearly rent of which exceeds that sum.

The Respondent has made an elaborate return, to show that he had jurisdiction over the case, and that his judgments overruling the defense to his jurisdiction and ejecting the defendant, are correct, as the latter held no lease and was merely a tenant by the month, paying ten dollars monthly rent.

In the exercise of the plenary powers of control and supervision, conferred upon it by Article 90 of the Constitution, this Court will not lightly interfere with the action of inferior courts on questions of jurisdiction, where such do not appear on the face of the papers, but are determined by the value of the matter in dispute, to be ascertained by evidence on the subject. It is only in cases of glaring abuse of a legal discretion on such issues that it will interpose its authority. We find no enormity in the case before us.

The pleadings show that the defendant, who was represented by the plaintiff as a tenant by the month for a small sum, has both by exception and by answer, *alleged* himself as holding a lease to the premises, from which he is sought to be expelled, the yearly rent whereof was one hundred and twenty dollars.

The question then presented is: Whether on this mere allegation, the City Judge was bound to dismiss the suit for want of jurisdiction.

Section 2156 of the R. S., reads:

"Whenever the monthly or yearly rent paid by the tenant, or the lease which he shall allege to hold, *shall exceed* one hundred dollars, then the summary proceedings * * * * for the possession of the leased property, shall be instituted and carried on, before any Parish or District Court having competent jurisdiction," etc.

The Statute is clearly that if the lease which the tenant alleges to hold, *shall* (be found to) *exceed* one hundred dollars, the proceedings shall be before a court of superior jurisdiction.

It is an indisputable proposition that where a question of law can be determined only after a question of fact has been investigated and settled, the court which is called upon to solve the former, must necessarily pass primarily on the latter. Such investigation is an irresistible condition precedent.

The Statute quoted authorizes the inferior Judge, before whom an expulsion suit is brought, to enquire into the correctness of the allega-

tion of the defendant, where the latter alleges a monthly rent or an annual lease, under which more than one hundred dollars are to be paid. It distinctly says: If the lease alleged "*shall exceed.*" Whether it exceeds or not the amount stated, is a question to be decided, not by the defendant, but by the court. The defendant must allege and prove and the court must decide, maintaining or declining jurisdiction, according to the proof administered.

If the *mere* averment of a defendant, sued for the possession of rented or leased property, that the rental exceeds one hundred dollars, were sufficient to defeat jurisdiction, the natural and unreasonable sequence would be, that *previous* to bringing an ejectment suit before the court, to which it would properly belong, a plaintiff should institute the proceeding before a court of different powers and have it to decide that it has no jurisdiction over the case, but that another court has. This is simply an absurdity, destructive of the object of the Act. Whether the rent to be paid, under an alleged lease, monthly or yearly, exceeds one hundred dollars, is a question legally within the jurisdiction of a City Court. To that end it may hear evidence and pass judgment.

It is, therefore, ordered and decreed, that the restraining order herein made *in limine* be rescinded, and that the petition for a prohibition be refused at the cost of Relator.

Fenner, J., dissents.

DISSENTING OPINION.

FENNER. J. The general rule unquestionably is, that the jurisdiction of a court over a cause, is determined by the allegations of the plaintiff's petition, but I am satisfied that, under the provisions of the Revised Statutes, Secs. 2155 and 2156, the law has established an exception to this rule. The first Section invests the City Courts with the general jurisdiction, at the demand of the landlord, to eject tenants whose leases have terminated, either by limitation or by any breach thereof. Specific allegations are not generally made in the formulation of claims before such courts; but the Section requires none except that the lease is terminated, and such pleading would present no test of jurisdiction. But Sec. 2156 provides that, "whenever the monthly or yearly rent paid by the tenant, or the lease which he shall *allege* to hold, shall exceed the sum of $100, then the summary proceedings allowed by the preceding Section shall be instituted and carried on before the District Court."

Thus, it is apparent that, on the face of the pleadings, the test of jurisdiction is to be found, not in the claim of the landlord, but in the pretensions of the tenant.

When, in answer to such a claim before a City Court, the tenant *alleges* that he holds a lease exceeding $100, in monthly or yearly rental, how is it possible that such court should exercise jurisdiction expressly and exclusively conferred, by the terms of the statute, upon the District Court? The reasons of the law-maker are obvious. When such a claim is presented by the tenant, a controversy is, at once, created, involving more than $100, and exceeding the jurisdiction of the City Court.

The pretension that the City Court can maintain its jurisdiction over such a controversy, by hearing evidence and deciding the controversy adversely to the tenant, seems to me, to the last degree, untenable.

I admit the difficulty arising from the case, with which proper jurisdiction may be defeated by false and fraudulent allegations, and it would, doubtless, have been wise for the legislator to have provided against it by requiring the tenant's answer to be sworn to, or by other proper regulation; but he has not done so, and Judges should obey his mandate.

I apprehend that evil consequences of a much graver character may flow from the doctrine now approved by the Court.

It practically invests these inferior courts with power to determine, in the last resort, all controversies between landlord and tenant, touching the existence and validity of leases of whatever value. A landlord desirous of obtaining possession of property of the rental value of $10,000 *per annum*, institutes his ejectment process before the City Court. The tenant sets up a lease of that value. The court hears evidence and decides against the defendant. His judgment is instantly executed by the ejectment of the tenant. What remedy exists? No appeal lies from the decisions of these courts to any tribunal. Prohibition affords no relief as this Court now decides. *Certiorari* would be equally ineffectual, because the testimony before these courts is not reduced to writing, and the record certified to this Court would afford no means of testing the correctness of the Judge's action.

I cannot assent to an interpretation of the law leading to such possible results, and, therefore, dissent from the opinion and decree.

No. 7558.

ALEAS HANEY VS. HENRY TROST.

In an action for damages for defamation, malice is the essence of slander, and it must be proved, either by direct testimony or by implication flowing clearly from the language and conduct of the defendant.

Hence, damages cannot be recovered against a party who informs against an employee of a railroad company, of conduct injurious to the company, of which the informant's wife is a stockholder. Judgment reversed.

APPEAL from the Fourth District Court for the Parish of Orleans. *Houston*, J.

A. E. Billings and *R. K. Cutler*, for Plaintiff and Appellee:

1. Evidence in justification cannot be relied on under the general issue.
2. When malice is shown to the satisfaction of the jury, the protection attached to privileged communications may not be availed of. (Townshend on S. and L., p 320, § 209.)
3. Malice proven, privilege is lost. (Odgers on L. and S. 267.) *Bona fides* is necessary to protect a communication, as privileged. (*Ib. et Id.*)
4. If *mala fides* was manifest, in the opinion of the jury, on competent testimony, malice has been established. (Starkie on S., pp. 286, 287, 288; Dunman vs. Bigg, *Ibid.*, 288, 290, 398, n.)
5. Hearsay is probable ground for belief; but a man must act *bona fide* on honest belief of the truth of statements *made to him by others, whom he believes to be creditable persons, to be justified in acting upon such statements, if he believes there is reasonable and probable cause for his so doing.* (Townshend on S. and L., p. 397, § 341, n. 3; Cockburn, C. J., in Chatfield vs. Comerford, 4 Fost. and L. 1008.)
6. Words spoken of plaintiff in the way of his profession or trade are actionable without proof of special damage. (16 L. 389; 12 An. 894; Odgers on L. and S., pp. 63, 64, and cases cited, and *Ib.* 16-20, 64, 69, 70.)
7. Words resulting in damage are actionable. (C. C. 2315.)
8. Plaintiff having been discharged from his employment, by reason of the effect of the slander of defendant, the subsequent profitable engagement of plaintiff will not abridge the liability of defendant. (16 L. 389; 14 L. 198; 3 An. 69; 11 An. 206; Townshend on S. and L. p. 293, § 198.)
9. Punitive damages may be given if thought proper by the jury, without evidence of malice beyond the words (Odgers on L. and S., p. 292 and n.)
10. A verdict in an action for slander will not be set aside for excessive damages unless there be some suspicion of unfair dealing, or unless the case be such as to furnish evidence of prejudice, partiality or corruption on the part of the jury. (Townshend on S. and L., p. 492, § 293.
11. Punitive damages are not measured altogether by the ability of the party to pay. Courts will not lighty disturb verdicts of this kind.
12. Falsehood in a statement, in a matter likely to effect injury to another, must be regarded as malicious wrong. Any indirect and wicked motive inducing a defamation is malicious. (Odgers on L. and S., pp. 266, 267.)
13. Questions of fraud, and weight of testimony, are peculiarly within the province of the jury, and their verdict will not be disturbed unless manifestly erroneous. (21 An. 182; 22 An. 31; 6 L. 492; Hennen's Digest, p. 92, b. and authorities.) To determine the facts and the credibility of witnesses is for the jury. (Proffat on Jury Trials, pp. 359, 361.) Where evidence conflicts, the province of the jury is exclusive. (*Ib.* 367, 473; 33 An. 1053.) The jury is to judge of the weight and sufficiency of the evidence. (Hilliard on New Trials, 247, 281; Proffat on Jury Trials, p. 368; 33 An. 1054.)

Cotton & Levy, for Defendant and Appellant:

Privileged communications defined. 3 Howard U. S. R. 266; Odgers on Slander, 197 to 209. P. 265: The mere circumstances of the statement being false, will not suffice to show malice, unless there is some evidence to show that the defendant knew it to be false; the whole evidence shows that defendant acted with the most perfect *bona fides* and belief. Declarations of defendant concerning plaintiff appear to have been uttered without malice and under circumstances from which no malice is in law implied. Proof of express malice required by law where defendant did not originate report concerning plaintiff, nor repeat it other than in good faith, and onus of proving malice cast on plaintiff. 76 Eng. Com. L. R. Vol. 13, p. 360, Harris vs. Thompson; 71 Eng. Com. L. R. Vol. 16, Taylor vs. Hawkins; Odgers on Slander, p. 268.

The opinion of the Court was delivered by

POCHÉ, J. This is an action in damages for slander. Plaintiff complains that in consequence of a malicious and false statement, made by the defendant to the foreman of the Magazine Street Railroad Company, he was discharged from his employment as car driver for said Company, and avers that he has thereby suffered damages in the sum of five thousand dollars.

The answer was a general denial, and defendant appeals from a verdict and judgment of one thousand dollars against him.

The charge made against plaintiff was, that he was in the habit of allowing persons to ride on his car without paying fare, and on the strength of that charge, plaintiff was discharged as car driver.

But the evidence fails to prove that the statement was made by plaintiff with malicious intent, or with any desire to injure plaintiff, either in his reputation or in the matter of his employment.

Malice is the essence of slander, and it must be proved, either by direct testimony or by irresistible implication, from the nature of the language and conduct of the defendant. Boullemet vs. Phillips, 2 Robinson, 365; Gilbrot vs. Palmer, 8 An. 130.

The record shows that defendant, whose wife was a stockholder in the Railroad Company, heard persons boast that the car driven by plaintiff was "*a good deadhead car*" for them, and that he thereupon called on the foreman of the Company, and made the charge against the plaintiff, who was the nephew of defendant's first wife, and against whom he had no ill-feeling. Without warning or further investigation, the foreman at once discharged the driver, informing him of the reasons which led to his discharge. It may be that the foreman acted too hastily, and should have watched the driver, or given him some warning, but defendant surely cannot be held responsible for such haste or apparent unfairness, and it nowhere appears that his purpose was to have plaintiff discharged from his employment.

His wife, being a stockholder in the Company, and directly interested in the proper administration of its affairs, it was defendant's undoubted

right to protect her interests by imparting the information of a damaging practice entailing loss on the Company and its stockholders, with the manifest intention of bringing about a correction of the abuse. The fact that in making his statement to the foreman, he informed him of the connection of his wife with the Company, is a circumstance which unmistakably explains his conduct, and with other circumstances, satisfies our minds that the charge was made with good motives and for justifiable ends.

We have searched the record in vain for any evidence tending directly or indirectly to show that in making the report to the Company, the defendant was actuated by malice or ill-will to plaintiff, in particular, or to his fellow-man in general, and hence, he cannot be held in damages for the language charged to him.

Although we should be, and are always, loth to disturb the verdict of a jury in such cases, yet we must do our duty when their finding would work glaring injustice, as would be the case in the present instance.

The views which we have expressed obviate the necessity of considering other defenses urged in the case.

It is, therefore, ordered, that the verdict of the jury be set aside, and the judgment of the lower court reversed; and that plaintiff's demand be rejected and his action dismissed, at his costs in both Courts.

No. 8458.

SUCCESSION OF DRAUZIN TRICHE.

Judgments homologating tutorship accounts and settling legal mortgages on the tutor's property, have not the force of *res adjudicata* against third possessors or special mortgage creditors, but are, as to them, at most, *prima facie* evidence.

When a direct conflict arises between such a judgment and the claims of such third persons, in a *concursus* for the distribution of funds, involving the necessity of settling immediately the ranks of opposing claims, they will not be remitted to an action of nullity, but may contest then and there the validity and rank of the claim allowed by the judgment.

Debts from a tutor individually to himself in his fiduciary capacity, when they become due and exigible during the term of the tutorship, are considered as collected by him and are secured by the legal mortgage on all his immovables, resulting from his tutorship and proper inscription.

Where property, burdened with a general and with special mortgages, is called upon to satisfy the former to the prejudice of the latter, the special mortgage, *junior* in rank, must suffer contribution before a *senior* special mortgage can be affected.

APPEAL from the Twentieth District Court, Parish of Lafourche. *Guion*, Judge, *ad hoc*.

Moore & Badeaux, for Opponent and Appellant.

Lewis Guion and *J. S. Goode*, for Opponents and Appellees.

Clay Knobloch, for the Administrator.

The opinion of the Court was delivered by FENNER, J.

No. 8599.

THE STATE OF LOUISIANA EX REL. MORRIS RANGER VS. THE CITY OF NEW ORLEANS.

A *mandamus* lies to compel the city authorities to levy a special tax to satisfy a judgment rendered on the City's matured bonds and coupons, where a *fi. fa.* issued is returned *nulla bona*.

Laws in force at the date of the contract, providing for the means of executing the obligations of the same, forming part of the contract, cannot be repealed; neither can the remedy be suppressed, to the injury of the obligee, but they may be replaced by legal provisions for another adequate or equivalent mode of enforcement; otherwise they impair the obligation of a contract.

The registry law of 1870, (Act 5) cannot affect a contract entered into in 1854, so as to retard or stay the execution of the obligations thereof. If enforced in this case, it would have that effect. Judgment affirmed.

APPEAL from the Civil District Court for the Parish of Orleans. *Tissot*, J.

D. C. & L. L. Labatt, for the Relator and Appellee:

1. Where a judgment creditor of the City has pursued and exhausted all legal remedy for the satisfaction of his judgments fruitlessly, he will be entitled to a mandamus to compel the corporation to levy a sufficient tax to pay the same, where the judgments are absolute and unaffected by any limitation whatever. See 8th Otto, p. 381, Ranger case.
2. The obligation of contracts being impaired by any legislation which lessens the efficacy of the remedy in force at the time of the debt was created, it inevitably follows that any construction of Act No. 5 of 1870, requiring registration of city judgments, under facts shown by this record, must impede, obstruct or postpone indefinitely plaintiff's right to punctual satisfaction, would be obnoxious to State and Federal prohibition. See 12th Otto, 203; Louisiana vs. N. O. and Wolff, 13 Otto.
3. In order to obtain the writ of mandamus, three things only are required to be shown by relator, which he has done in this case: first—that he has a clear right; second—that a

corresponding duty rests on defendants; third—want of any other specific or adequate remedy. See Justice Strong, Commonwealth vs. Pittsburg, 35 Penn. Stat., 509; 8 Wh. 1; 2 How. 605; 4 Wall. 553.

4. It being satisfactorily shown that the contract between a bondholder and the corporation defendant antedated a subsequent constitutional provision limiting taxation, so as to prevent or indefinitely postpone payment of matured municipal obligations, the limitation should be declared unconstitutional, as impairing the obligation of contracts.

C. F. Buck, City Attorney, for Defendant and Appellant:

1. In a proceeding by mandamus to compel the levy of a special tax to pay a judgment, the latter will be accepted as evidence of a valid claim; but to determine whether the relator is entitled to the tax prayed for, the court must look to the original contract between the bondholder and the City.
2. If the law authorizing the issuance of the bonds not only provides no tax for the payment of the principal, but excludes the idea of payment by special taxation by other provisions for their retirement, a special tax to pay judgment founded on such bonds, will not be awarded; the judgment creditor must be left to his ordinary remedy under the terms of Act No. 5, Acts of 1870, and no tax can be ordered for his benefit beyond the limit now imposed by law.
3. The provisions in the Act No. 109, Acts 1854, that the bonds therein authorized to be issued shall be redeemable by conversion into railroad stock, while it may leave the bonds not so redeemed as a valid debt of the corporation, is an exclusion of payment by special taxation.
4. The city authorities will not be compelled by the writ of mandamus to the performance of a specific duty, unless it is alleged and proved that a formal and proper demand was made on them before the institution of the suit.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the city authorities to levy a special tax to satisfy two final judgments obtained by the Relator against the City, and upon which *fi. fa.'s* issued, were returned *nulla bona*.

The defenses set up are numerous. We deem it unnecessary to enumerate and to consider them expressly.

They were each and all presented, urged and decided in three cases, which received the entire attention of the highest Court in the country, in two of which the Relators were parties complainant. See 3 Otto, 381; 12 Otto, 203; 13 Otto, 358.

The record shows that the registry of the judgment, which was not freely made, but under judicial compulsion, will have the undoubted effect of retarding, if not altogether staying the execution of the obligations of the contract between the Relators and the City of New Orleans, evidenced by the bonds and coupons held by the Relators, and upon which they recovered.

The amount of other judgments registered approaches a million of dollars. The provision made by the municipal authorities to satisfy them is practically insignificant, as it proves insufficient to discharge even one-half of the interest generally due on the same.

When the bonds were issued in 1854, the contract was entered into, and the laws in force at that time, for the enforcement of the obligations of the contract, formed part of it.

The writ of *fieri facias* was then the practical means for the execution of the contract.

The suppression of that proceeding, as against the City, by the subsequent legislation of 1870, (Act 5) and the failure to replace it by an equivalent and adequate remedy, cannot affect the right of the bondholders in this case, without impairing the obligation of their contract.

Under the authority of the cases cited, decided by the Supreme Court of the United States, which is obligatory upon this Court, and under the facts disclosed in this controversy, the Relators are entitled to the relief sought.

Judgment affirmed.

Poché, J., concurs, for reasons in his separate opinion.

CONCURRING OPINION.

POCHÉ, J. I rest my concurrence in the decree rendered in this case exclusively on the ground that all the defenses set up by the Respondent have already been passed upon by the Supreme Court of the United States, and that Relator's position had thus become unassailable, so that the relief obtained by him has been forced through this Court, by the adjudications of the Supreme Court of the United States.

No. 8621.

THE STATE OF LOUISIANA EX REL. N. V. VINET ET AL. VS. WM. VOORHIES, JUDGE OF THE SECOND CITY COURT OF NEW ORLEANS.

An allegation by a party in an injunction suit, touching the value of movable effects seized as the property of another party, will not estop the same plaintiff from alleging and proving a different value of the same property in another and distinct suit.

The determination of the value of such property is within the judicial discretion of the lower court, and the judge thereof will not be guilty of contempt, for entertaining jurisdiction of the second suit, because he had been prohibited from entertaining jurisdiction of the first suit, in which it appeared that the value of the property involved in the first suit exceeded his jurisdiction.

Rule for contempt discharged. Prohibition refused.

APPLICATION for a *Certiorari*.

Merrick, Foster & Merrick, for the Relators.

The Respondent *in propria persona*.

The opinion of the Court was delivered by

POCHÉ, J. Relators apply for a *certiorari* and urge a rule for contempt against the defendant Judge, on the following grounds:

That in disregard of a writ of prohibition issued by this Court, directed to the defendant, inhibiting him from entertaining jurisdiction of an injunction suit, filed for the purpose of arresting the seizure of certain movable effects of the alleged value of $288, the said Judge has since proceeded to issue another injunction restraining the sale of the identical property in a suit between the same parties.

The Judge answers, and the record bears him out, that after service on him of our writ of prohibition, he at once dismissed the suit for injunction then pending in his court, and that the execution therein sought to be enjoined proceeded in its legal course. Whereupon the original plaintiff in the suit thus disposed of, entered another distinct and separate suit, for the purpose of arresting the execution, by levy on the identical property which had been the subject matter of the previous litigation, alleging in her last petition, and showing by an official appraisement, made under the supervision of the constable, one of the Relators, that said property was worth only ninety-eight dollars and ninety-five cents.

The legal purport of the prohibition issued by this Court, (O. B. No. 56, p. 1145,) was to restrain the Judge of the City Court from entertaining jurisdiction of an injunction suit, in which the value of the property seized *prima facie* appeared to exceed one hundred dollars; the nature or identity of the personal effects seized is not sacramental, as a test of the jurisdiction of the court, which must be determined according to the value of the property, as shown by the papers on the trial of the exception.

The allegation in pleadings of the value of a specific piece or item of property is, after all, an allegation or opinion which, if erroneous, can be corrected at any stage by the party making it, and will not conclude the Judge, if shown to be erroneous by evidence.

The plaintiff in the second injunction suit could not, therefore, be estopped from alleging a different value of the identical property from the valuation made by her in her previous suit.

The determination of the value of the property seized, under the evidence and the pleadings in the suit now pending, was a matter within the legal province and judicial discretion of the Judge, who has, therefore, violated no order or decree of this tribunal in the premises.

The rule for contempt is, therefore, discharged, and the writ of *certiorari* is refused, at Relators' costs.

No. 8673.

THE STATE OF LOUISIANA VS. MARCEL WOLFF.

Embezzlement is not an offense at common law, but was created by Statute. Embezzle includes in its meaning, appropriation to one's own use, and therefore the use of the single word embezzle, in the indictment or information, contains within itself the charge that the defendant appropriated the money or property to his own use.

The simplification of criminal pleadings was commanded by this State in her first criminal Statute directing the common law forms to be divested of unnecessary prolixity.

APPEAL from the Criminal District Court for the Parish of Orleans. *Roman*, J.

J. C. Egan, Attorney General, for the State, Appellee.

E. E. Moïse, for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The defendant was tried on a charge of embezzling twenty-two dollars of his employer's money, and upon conviction was sentenced to one year's confinement in the penitentiary.

A bill of exceptions was taken to the admission in evidence of the prisoner's confession, and states two grounds of objection:

1. "That nothing in the confession showed the embezzlement or offense charged in the information, or at the date in said information alleged, and the fact alleged had not yet been shown."

We take this to mean that the embezzlement confessed does not by the terms and date of the confession appear to be the embezzlement charged, and the fact or act of embezzlement had not been proved when the confession was offered.

The confession was proof of itself of *an* embezzlement, and it was for the State to establish afterwards that it was *the* embezzlement charged, which appears to have been done to the satisfaction of the jury.

2. "That there being no allegation in the information of the said Marcel Wolff having appropriated any money to his own use, so much of said confession as went to show that fact should not be allowed to go to the jury."

There is no need under our Statute of using in the information the words "appropriated to his own use." The objection, carried to its logical conclusion, would be that unless a prisoner's confession is in the identical words of the Statute, it is inadmissible.

There was also a motion for a new trial embracing these two grounds just disposed of.

The motion in arrest of judgment is based upon the alleged insufficiency in law of the charge in the information, in not setting forth that

the money therein alleged to have been wrongfully used had been appropriated to the prisoner's own use and benefit by him the said Marcel Wolff, etc.

Our Statute punishing embezzlement is in these words:

"Any servant, clerk, * * who shall wrongfully use, dispose of, conceal or otherwise embezzle any money * * which he shall have received for another, or for his employer, * * or by virtue of his office, trust or employment, * * shall suffer, etc." Rev. Stats. Sec. 905.

The information follows the Statute, employing its identical words, except that "and" is used instead of "or," thus reading "conceal and otherwise embezzle," but this substitution of the copulative to the disjunctive conjunction does not, as the defendant's counsel insists, make an important difference in the law. The charge would have been sufficient if it had used only the word embezzle, and omitted the others, "use, dispose of, conceal."

Embezzle means to appropriate to one's own use property or money entrusted to him by his employer. The use of that word supplies the place of the sentence, which the counsel earnestly contends is sacramental. The single word embezzle means all that the sentence does, and something more.

Embezzlement is not a common law offense. It had its origin in the efforts to amend the law of larceny. The first Statute was *tempo* Henry 8, in which the descriptive words were, "did embezzle or otherwise convert the money to his own use." The Statute of George 4 (1827) improved and superseded the earlier one, and there the words are "shall fraudulently embezzle." Our Statute has, "shall wrongfully use * * or otherwise embezzle." The aim of succeeding Statutes is to simplify criminal practice by avoiding verbosity and repetitions and circumlocutions in pleadings, and this Court, in encouraging and giving aid to such simplification, only hearkens to the voice of the State when in her first criminal Statute she commanded that the forms of indictment should be divested of unnecessary prolixity.

Judgment affirmed.

No. 7966.

JEAN MARIE SAUX vs. I. W. PATTON, MAYOR, ET AL.

When the prayer of the petition contains no moneyed demand whatever, and the plaintiff asks that his right to sue for damages hereafter be reserved, the Supreme Court is without jurisdiction of the suit.

APPEAL from the Sixth District Court for the Parish of Orleans. *Rightor*, J.

Sambola & Ducros, for Plaintiff and Appellee.

C. F. Buck, City Attorney, for Defendants and Appellants.

The opinion of the Court was delivered by

MANNING, J. The plaintiff alleges that in 1854 he bought a piece of ground fronting the centre gate of the lower city park, and built a residence and a house for business upon it, believing that the park was to become a place of public resort and of amusement as it had been thus dedicated by the City Government. He represents that it has been divested from this object, and instead is used as a pasture wherein horses, cows, and other animals are kept to his great detriment as well as that of the public, which animals injure the trees and pathways and deter visitors, and prevent families from enjoying the park through fear of them, whereby he is deprived of the profit he would otherwise realize from selling refreshments, and is further endamaged in his property which has become of small value because of this misuse of the park.

He obtained an injunction to prevent the further use of the park for pasturage, and the prayer of his petition is that this injunction be perpetuated, and his right to sue for damages in a separate action be reserved. There was judgment perpetuating the injunction, from which the mayor and administrator defendants appealed, but seem to have taken no further notice of the matter. No appearance by brief or otherwise is made for them here.

There is no moneyed demand of any kind or amount made by the plaintiff, and we are therefore without jurisdiction. There is in the body of the petition an allegation that the damage he will suffer will be at least five hundred dollars per annum if the defendants are permitted to continue their misuse of the park. The suit was filed March 3, 1880, and was tried two months after. The plaintiff notices the want of jurisdiction but makes no motion based thereon.

There is no allegation that brings the case within our jurisdiction, and the appeal is therefore dimissed.

No. 7957.

MRS. MARY JANE ACKERLY VS. PATRICK SULLIVAN AND THOMAS O'NEIL.

A suit for damages resulting from falling over a piece of scantling which stretched across the banquette of a street, with one end resting on the door sill of a house in charge of the defendant, cannot be sustained, in absence of proof that defendant or his employees placed the scantling there or knew of its being so placed.

Singleton & Browne, for Plaintiff and Appellee:

The defendant, in occupying or encumbering, or permitting the encumbrance of the banquette with materials, when they were not necessary to be used in the construction or repair of a house, did so in violation of the city ordinance, and is responsible for all damages resulting from such violation. City Ordinance, No. 127, (1). Thompson on Negligence, Vol. I, 340, 343; Vol. II, 1232.

It was negligence on the part of the defendant to put, or leave, or permit a piece of scantling to lie on the banquette, when he had no need therefor.

The defendant was not lawfully in possession of one-half, or any portion of the banquette, unless it was necessary for him to use it.

The plaintiff had a right to expect the banquette to be free and unencumbered, and she was not obliged to be looking at the banquette in front of her, and it was not contributory negligence in her if she failed to watch the banquette and see the scantling. Hill vs. Seekonk, 119 Mass. 85; Hawks vs. Northampton, 121 Mass. 10; Koch vs. Edgewater, 14 Hun. 504; Clark vs. Lockport, 49 Barbour, 580; Whitely vs. Pepper, 20 Moak's Notes, 341; Thompson vs. Bridgewater, 7 Pickering, 187; Woods vs. City of Boston, 121 Mass, 337; 46 Penn. Rep. 316.

The damages are not unreasonable; on the contrary, they are too small, as her suffering was great, and the injury permanent, and we have asked that the judgment be amended so as to give her $2,500. The law regards rich and poor alike, and whether plaintiff was required to work for her living or dependent upon her son, is not a matter of consideration. Sedgwick on Measure of Damages, (5 Ed.) p. 787. *Ibid*, p. 648, note 2.

J. O. Nixon, Jr., for Defendant and Appellant:

To recover in an action *ex delicto*, plaintiff must show some negligence on the part of defendant, or those for whom he is responsible. 15 An 105; 16 An. 121, 151; 15 An. 448.

Under the city ordinance the defendant was lawfully in possession of the inside half of the banquette; if plaintiff went thereon, it was at her own risk. 12 Indiana, 515; 11 An. 712.

The plaintiff was guilty of contributory negligence.

The damages recovered are excessive.

The opinion of the Court was delivered by

FENNER, J. The defendant appeals from a judgment rendered against him, upon the verdict of a jury, for damages occasioned plaintiff by her tripping and falling over a piece of scantling which rested upon the door-sill of a building and ran across the banquette of the street, unlawfully obstructing the same. The fall broke her wrist, occasioning suffering and other injury. The suit was brought against Sullivan, as owner of the building, and O'Neil, as contractor for its construction; but, it appearing that O'Neil was in full possession and control of the building and workmen employed therein, the verdict was in favor of Sullivan and against O'Neil only.

Plaintiff alleged that said "piece of lumber had been run out of said building by defendants or those in their employ," and that "the placing of the same across a frequented thoroughfare by said defendants or their employees, was gross and wilful negligence, and contrary to law," and rendered defendants responsible for the damages.

There is a complete failure of proof that defendant or any of his employees placed the scantling there or even knew of its being there. On the contrary, the evidence is positive that they did not so place it or know of its being there; that it was not needed in such position for any possible purpose of the work which was being done; that O'Neil left the building at about 12 o'clock in the day, when the men struck off work for dinner; that, at that time, the banquette was clear; and that very shortly after and while the men were at dinner, the accident occurred. How, or by whom, or for what purpose the scantling was placed, is totally unaccounted for.

Certainly, it was an essential element of plaintiff's cause of action to establish some fault or negligence on the part of defendant or his employees as a condition precedent to his liability for damages.

In this she has completely failed, unless we should hold that the bare fact, that the scantling was there with one end resting upon the door-sill of a house of which defendant was in charge, was sufficient to make him liable, whether or not he or his employees placed it, or knew of its being there. Such a proposition is certainly repugnant to common sense, and we know of, and are referred to, no law or authority sustaining it. It would extend the responsibility of owners or persons in charge of buildings beyond all reason, and would require them to mount guard in front of their houses lest the act of any street *gamin* might subject them to heavy damages.

The argument that defendant's employees must or should have known of this obstruction because they were at dinner in the house, twenty feet off and in range of view, at the time when it was placed, comes with little grace from plaintiff, who, being a person of sound sight and unimpaired faculties, ran over the same obstruction, in broad daylight, without seeing it.

There is no foundation for the verdict or judgment.

It is, therefore, ordered and decreed, that the judgment appealed from against the defendant, Thomas O'Neil, be annulled, avoided and reversed, and that there be judgment in his favor and rejecting plaintiff's demand, with costs in both Courts.

No. 7598.

WM. VAN WREN VS. HUGH FLYNN.

Defendant sold furniture to plaintiff for a price paid partly in cash and partly in notes, and it was at the time agreed that, if the notes were not paid at maturity, defendant could retake the furniture.

Held: that, notwithstanding non-payment of the notes, such agreement did not authorize defendant to enter the home of plaintiff in his absence, without his consent and without notice, and to take away the furniture.

Under the particular circumstances of this case, the court refused to disturb a verdict for $750—holding that the small value of the furniture did not affect the question—the unlawful entry of the pauper's hovel and abstraction of his scanty possessions being an injury identical in character and magnitude with the like entry of a palace and despoiling it of its gorgeous apparel.

APPEAL from the Sixth District Court for the Parish of Orleans. *Rightor*, J.

Ellis & Ellis and *John McEnery*, for Plaintiff and Appellee:

Where defendant claims his right to take the property by agreement, he should have returned the part of the price paid and the notes, and should have demanded the furniture; and if refused, should have proceeded through the courts. No one has a right to take the vindication of his supposed legal rights in his own hands, and a verdict of a jury awarding damages against one who does so will be favored rather than disturbed by the court. C. P. 1, 147; 29 An. 214, 223; 1 Rob. 140; R. C. C. 2315; 30 An. 926, 929; 13 An. 102; 33 An. 393.

Kennard, Howe & Prentiss, for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Plaintiff bought from defendant, a furniture dealer, a set of furniture and paid for it.

Subsequently, he bought from defendant another set of furniture, under an arrangement by which he returned a part of the first set, valued at $37.50, which defendant agreed to take back and credit on the price of the second set, and for the balance of said price he furnished his promissory notes, payable at 30, 60 and 90 days.

Conflicting testimony is presented touching the existence and nature of a verbal agreement made between the parties at the time of the contract. We eliminate the contradictory statements of plaintiff and defendant, and accept that of the only other witness present at the time, who says that "Wren agreed with Flynn that in case he, Wren, did not pay his notes when they became due, Flynn could retake the furniture again."

Shortly before the maturity of the first note, on account of the illness of his wife, plaintiff, under medical advice, took her to Tangipahoa Parish, on the Jackson Railroad. On leaving, he sent a messenger to defendant, informing him of the cause of his departure and stating

that, upon his return, he would settle his bill; to which the defendant made no objection. Owing to continued ill-health of his wife and other sickness in his family, his absence was prolonged until nearly a month after the maturity of the last note.

In the meantime, the notes had all matured, and defendant had several times sent his collector to plaintiff's house without finding him; but it does not appear that he made any other effort to communicate with him or to notify him of his intention to retake the furniture, if not paid.

On the 27th of September, defendant went to plaintiff's house with a wagon and several men; entered the same, which was then occupied by plaintiff's mother, sister, and sister-in-law; informed these ladies that he had come to take the furniture, and disregarding their statement that Wren's return was expected and their request that he should wait until his return, he caused the contents of the furniture to be taken out, and removed and carried away the same.

That same night defendant returned with his invalid wife and children, and found their sleeping apartments denuded of furniture, so that they were compelled, in order to find accommodation, to send off some members of his family to other quarters.

It is in evidence that plaintiff had provided himself with means to pay for the furniture and had returned with that purpose, according to the assurance which he had conveyed to defendant when he left the city, and to which the latter had not objected.

No one appreciating the jealous care with which our law guards the sacredness of every man's house and his lawful possession of property against invasion or disturbance, otherwise than by proceedings taken under the sanction and through the agency of the public justice, can question that, unless removed from its general principles by the effect of the agreement set up in defense, the acts which we have detailed constituted a gross outrage upon the rights and feelings of plaintiff, as a citizen and a man, for which courts of justice must either grant redress or sanction the personal exaction of satisfaction by violence. Thayer vs. Littlejohn, 1 Rob. 140.

The agreement established in this record cannot shield the conduct of defendant. It does not purport, in terms, to confer upon the defendant the right to enter the house of plaintiff, in his absence, without his consent, and without notice, and to carry off its contents. An agreement conferring such extraordinary power would need to be so clearly worded and proven as to leave nothing to implication.

The grant of the simple right to retake his furniture, on non-payment of the price, cannot be construed to embrace such power.

It conferred, at most, a legal right upon defendant, which, like other rights, could be enforced only with consent of plaintiff or by legal process; and we doubt, under the evidence here, whether any court would have awarded possession to Flynn, without requiring antecedent tender or payment of that part of the price which had been paid.

This case is entirely different from that of Jencks vs. Home Sewing Machine Company, recently decided, where we rejected the claim of plaintiff, because, having consented to the retaking by plaintiff, she was present when he exercised the right and made no opposition.

We are not disposed to interfere with the allowance by the jury of $750 as damages. The discretion of juries in such matters is not to be interfered with, unless manifestly abused.

The argument that the slight value of the furniture involved justifies a reduction of damages, has no weight.

The unlawful invasion of the pauper's hovel and abstraction of its scanty possessions, is an injury identical in character and magnitude with the like entry of a palace and the despoiling it of its gorgeous apparel.

Judgment affirmed.

Rehearing refused.

No. 8685.

JOHN H. SMITH VS. ORLEANS RAILROAD COMPANY ET AL.

Where an appeal is dismissed, on the ground of material deficiency or incompleteness of the transcript, the Court on an application for a rehearing is authorized to observe that the judgment appealed from not having been signed, the application for an appeal was premature and can maintain its previous ruling, for that additional reason. Rehearing refused.

APPEAL from the Civil District Court for the Parish of Orleans. *Lazarus*, J.

Andrew J. Murphy, and *F. W. Baker*, for Plaintiff and Appellee.

Chas. Louque, for Defendant and Appellant.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. Among the other grounds set forth in the motion for the dismissal of the appeal, we find the following:

That the transcript does not contain the motion and order of appeal of May 23d, 1882, and the original answer of defendants.

It appears that on the 13th of April, the defendant applied in the court below for an appeal from the judgment therein rendered, which application was refused.

Thereupon, a mandamus was applied for to this Court, to compel the said Judge to grant the appeal. The mandamus issued, and in due course was made peremptory. We must presume that the District Judge complied with this order, and granted the appeal, in the absence of any suggestion to the contrary.

But neither the order of appeal nor the original answer of the defendants is in the record. And although there was sufficient time, after the filing of the motion to dismiss the appeal, for the appellant to have corrected the record and supplied the omissions, yet no such application has been made, and no answer ever has been made on the brief of the appellee's counsel on the motion to dismiss.

In the absence of these important documents, we cannot entertain the appeal, and that they are not in the record, must under the circumstances stated, be attributed to the fault of the appellant.

Appeal dismissed.

ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. The defendant has failed to convince us that we have erred in dismissing the appeal in this case.

The transcript is deficient by the fault of the appellant, in not containing the answer to the petition and the motion and order of appeal.

No doubt the appellant, in the face of the clerk's certificate, had a right to suppose that the transcript was complete; but, after the warning given in the motion to dismiss, the appellant was bound to know of the omissions complained of, and should have had them accounted for, or supplied.

Whether the appellant knew or not that the motion to dismiss had been made, is immaterial. The motion was filed and posted, in the manner and during the time prescribed by the Rules of Court. No service or other notice was necessary. Knowledge was thus conveyed.

We cannot consider the certificate and *affidavit* annexed to the application for a rehearing. In such cases, the only question presented is: Has the Court erred in its ruling? The error, if any, cannot be established by documents not previously submitted and considered.

We deem ourselves authorized, under the exceptional features of this case, to say, that had we not dismissed the appeal, for the reasons stated in our opinion, we would have done so *proprio motu*, had we noticed the irregularity, on the ground that the judgment appealed

from is inchoate, never having been signed by the District Judge, and, consequently, that the appeal was prematurely asked. L. D. 16. (2.)

The judgment was rendered on the verdict of the jury, for the amount found by them.

A motion for a new trial was next made. On the trial of that motion, the Court intimated that, unless the claim, verdict and judgment were reduced from *two* to *one* thousand dollars, it would grant a new trial.

The plaintiff thereupon moved to be permitted, and was allowed to enter the *remittitur*.

It does not appear that he ever made the *remittitur*, in furtherance of the permission granted.

If his motion to be permitted to do so, be considered as a *remittitur*, it does not appear that the Court acted upon it, or by doing so, that it reduced the judgment previously rendered, from *two* to *one* thousand dollars.

The original judgment for two thousand dollars is unsigned. It is followed, in the transcript, after three intersecting lines, by the motion to be permitted to enter the *remittitur*, which is headed by the word *remittitur*.

That motion, found in another part of the record, is also followed by the words: "Judgment signed April 10th, 1832." Next comes the signature of the Judge.

The plaintiff, upon obtaining the authority to remit, should have formally entered the *remittitur*. Upon his doing so, the Judge should have amended his previous judgment by decreeing a recovery of *one*, instead of *two* thousand dollars. This was not done. The only judgment rendered has never been modified and remains unsigned.

The signature of the motion for permission to enter the *remittitur*, even in the form and manner in which it was made, is not the signature of the judgment contemplated by law. 30 An. 63; 24 An. 259.

It is not until after the judgment, modified or not, shall have been signed, that an appeal can be taken from it.

It is, therefore, manifest that the judgment, being unsigned, cannot be executed or appealed from, and that everything that was done subsequent to its rendition, was premature and *non avenu*.

When this Court granted the *mandamus* mentioned in the original opinion, it did so on the theory that the judgment had been signed. The transcript now before us was not then submitted. That the judgment was signed, was, therefore, an assumption in error.

Rehearing refused.

No. 8690.

WM. G. KIBBE VS. KESIAH CAMPBELL.

A possessor of the lands of another, who erects buildings or other works on such lands, is entitled to recover from the owner of the soil the value of his materials and the price of workmanship, if the owner of the soil elects to keep the works. Until such election is made by the owner of the soil, the possessor remains the owner of the works, and owes no rent.

This rule applies to lands which are the separate property of a married woman. Judgment affirmed.

APPEAL from the Sixteenth District Court, Parish of Vermillion. *Clegg*, J.

O'Bryan & White, for Plaintiff and Appellee:

Where the wife, by selling the same, converts to her own use improvements placed on her plantation by a third person, who had occupied the place by permission of her husband, she becomes indebted to such third person for the cost of the improvements. C. C. 508; 5 An. 125; 8 An. 512.

The measure of her liability is the value of the materials furnished, and price of workmanship paid by such third person: "without any regard to the greater or less value, which the soil may have acquired thereby." C. C. 508; 16 An. 587-588.

Improvements so placed on the wife's separate property, belong to her as to any other owner of the soil, when she elects to assume ownership of the same. And the debt therefor is due by her, and not by the community. 29 An. 761; 5 An. 125; 8 An. 512; 14 An. 194; 2 An. 244.

The prescription of ten years *only* applies to actions founded on a *quasi* contract. C. C. 3544 10 An. 395; 15 An. 143.

Claims for rent are subject to the prescription of three years. C. C. 3538; 24 An. 73.

Actions for trespass are prescribed by one year. C. C. 3536; 20 An. 323; 21 An. 492; 26 An. 511.

Robt. S. Perry, for Defendant and Appellant:

The husband's gratuitous disposition of a wife's property is null. H 880, No. 7; 21 An. 216; 4 L. 484. One who administers merely cannot give. If the use or usufruct be community, the husband cannot dispose of it gratuitously. C. C. 2204; C. N. 1422; Marcadé, Vol. 5, p. 514; Rogron Ex. Code Civile, p. 1036. If it be not community, he is only administrator. C. C. 2385, 2386; C. N. 1428; Marcadé, Vol, 5, p. 524, II. Also p. 522, I.

If husband grants gratuitous use, and the former proposition is incorrect, the right granted is to be assimilated to *usufruct*, and no compensation can be claimed for improvements. C. C. 569, 594; 18 An. 269; 21 An. 216; C. N. 599. And there is no cause of action.

A debt created by the husband administering, for improvements on the wife's land, the community existing, is a community debt—the wife is, in no sense, bound towards the community until she resumes the administration and retains the improvements as she may. Then she becomes debtor to the community for one-half the increased value. The community alone is the debtor to the third person for the cost of improvements. 8 R. 189, 7; 12 R. 385, 9; 6 An. 635; C. C. 2408, 2377; 16 An. 145; 13 An. 546; 18 An. 105, 588; 20 An 206, 9; C. C. 2403; 29 An. 751; 31 An. 794.

The case is different when, under C. C. 508, a person goes on land of another *bona fide* and with his own materials improve, from that where the materials used are taken from the land.

An action to recover for use of property on a *quantum meruit*, or *quasi* contract, is prescribed by ten not three years. C. C. 3538, does not apply, because this is not "for arrearages of

rent charges, etc., or for the hire of movables or immovables." Rent charge has a specific meaning. C. C. 2779, 2780, 2787, 2788, 2792; 6 N. S. 423; 1 An. 209. The difference between rent of land and lease is that one is a perpetuity, the other is not. C. C. 2780. The contract of lease or of hire is defined by C. C. 2669, as a "Synallagmatic Contract, etc." See C. C. 2670, 2745, 2746, *et seq;* as to contract of hire. See also C. C. 2293, 2294, 3544; 5 An. 295; 10 An. 395; 32 An. 1091. The 24 An. 73 is *obiter*.

The opinion of the Court was delivered by

POCHÉ, J. This litigation grows out of the following facts:

In the year 1871, plaintiff entered on and took possession of a plantation, the separate property of the defendant, then a married woman, and cultivated the same until August, 1877.

He went on the place with the permission of defendant's husband, who was her agent, and as such administered her separate property; and who made an agreement under which plaintiff was to purchase the place at some future time, at a stipulated price. When plaintiff's possession began, the property was not improved, and was not rentable; and during his occupancy of the same, he built on it a small sugar house, other buildings, and made other useful improvements which he alleges to have cost him $2296. The object of this suit is to recover that amount from the defendant, who sold the property on the 24th of August, 1877, to other parties for the sum of $6500, out of which sum $1000 were paid over, with her consent, to plaintiff, as the estimated value of his then growing crop of sugar cane.

Defendant first excepted, that plaintiff's petition disclosed no cause of action, and her exception being overruled, she pleaded in reconvention the rent of the place, for over five years, at the rate of $500 per annum, praying in the alternative to offset the value of the improvements by the rent, and she further reconvened for the sum of $1644.50, as the alleged value of timber and other materials taken from the place, and appropriated by plaintiff. The District Court allowed to plaintiff, as the cost of his improvements, the sum of $1935, and allowed to defendant, on her reconventional demand for rent, the sum of $1295. Defendant appeals, and plaintiff moves for an amendment, so as to recover the full amount of his claim and to defeat defendant's claim in reconvention. Between the date of filing defendant's exception and the trial thereof, plaintiff filed an amended petition, alleging more specifically than was done in his original petition, that the plantation was defendant's separate property. The Judge did not err in considering, and giving effect to the amended petition, which appears to have been duly served on the defendant.

Plaintiff's right of action arises from the following provisions of Art. 508 of our Civil Code:

"When plantations, constructions and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them, or to compel this person to take away or demolish the same." * *

"If the owner keeps the works, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby." * *

The text of this Article, has received frequent judicial interpretation, and is now well understood to mean that the possessor of the lands of another is entitled to be reimbursed the actual cost of such constructions, or to remove the same, subject to the option of the owner of the soil.

In this case, it appears from pleadings that plaintiff was a possessor in good faith, and it follows that in selling the land with all the buildings, fences and other improvements thereunto situated, without excepting the constructions made thereon by the plaintiff, the defendant must be held to have elected the exercise of her legal right to keep the works, and hence her obligation to reimburse the owner for the cost of the same. 2 An. 376, Stanbrough vs. Barnes; 11 R. 225, Miller vs. Merchant; 2 An. 339, Womack vs. Womack.

We therefore conclude, that plaintiff's petition does disclose a cause or right of action, and that defendant's exception was properly overruled.

ON THE MERITS.

The evidence substantially supports the statement of facts contained in the beginning of this opinion, and justifies that part of the judgment which was rendered in favor of plaintiff.

There is no force in the position assumed by the defendant in urging that she cannot be held responsible for the value of improvements made to her separate property during the existence of the community.

The test of her responsibility must be found in her action in electing to keep the works made on her separate property, by a third person, during the latter's possession.

Her husband's authority to plaintiff to take possession of the land, is invoked for the sole purpose of showing possession in good faith, but not under a contract of lease. We know of no law which authorizes a married woman to enrich herself at the expense of another. 29 An. 750, Jordan & Co. vs. Anderson.

Nor can plaintiff be concluded by his failure to claim the value or reimbursement of his works at the time of the sale in 1877.

He was then reimbursed for the value of his growing crop, and he

explains, in his testimony, the reasons of his silence on the subject of his improvements.

If correct, defendant's argument would estop her from claiming her rent; for she actually paid $1000 to plaintiff, without even mentioning the subject of rent.

And in that connection, we think that the District Judge erred in recognizing defendant's reconventional demand for rent.

The record shows that at the time of plaintiff's occupation of the land, the property could not be rented, and was occupied by a party free of other charge than the care and custody of the property.

It further appears, that the rental value of the plantation, between the years 1873 and 1877, was due and attributable exclusively to the sugar house, out houses, fences, ditches, seed cane and other improvements placed on the property by plaintiff.

Under the plain terms of the Article of the Code, these works remained his property until the ownership of the same was changed by the act of the defendant, in the exercise of her legal option, to keep them or to cause their renewal. As this act was performed by the defendant only at the time of her sale, the works remained the undisputed property of the plaintiff, and hence, he cannot be held to pay rent for a tract of land to which his labor and disbursements had contributed its only rental value. In the case of Baldwin vs. Union Insurance Company, 2 Robinson, 137, we find the following language predicated on a kindred issue:

"Our law has so far modified the effects of accession in such cases, as to give to the owner of the soil only the alternative of having the buildings removed at the cost of the person who erected them, or of keeping them as his own, on paying to the owner of the materials their value and the price of workmanship.

"Until this election be made, the works, although subject to this right of acquisition given to the owner of the soil *continue to belong to*, and are at the risk of the person who made them." Fernandez vs. Soulié, 28 An. 31.

We have given due consideration to defendant's argument, that some of the materials used in the works were from timber taken and growing on the place. But we find, on the other hand, that in his statement of expenses, plaintiff makes due allowance for the timber and other materials belonging to the place and thus used by him; and we think that these matters are honestly and properly adjusted by him.

We are constrained to reject defendant's reconventional demand for rent. 16 La. An. 243, D'Armand vs. Pullin.

The evidence does not support her demand for cord wood and other

items of property alleged to have been taken from the place and sold by plaintiff.

The judgment of the lower court is therefore amended, in so far as it allows rent to the defendant in the sum of $1295, which claim must be denied, and as thus amended, said judgment is affirmed, at defendant's costs in both Courts.

Rehearing refused.

No. 7738.

MRS. LISE BOISBLANC, WIDOW, ETC. VS. THE LOUISIANA EQUITABLE LIFE INSURANCE COMPANY.

Where a *prima facie* case is made out, and the Insurance Company has set up breach of warranty and intemperance, the burden rests upon it to make out the defense. Where it fails in that regard, the beneficiary will recover. Judgment affirmed.

APPEAL from the Sixth District Court for the Parish of Orleans, *Rightor*, J.

Jas. Legendre, for Plaintiff and Appellee:

1. In a suit to recover on a policy of insurance, the burden of proof in avoidance of the policy is on defendant. If defendant fails to prove the matters set up in defense, plaintiff will recover. Campbell vs. N. Eng. Mut. Life Ins. Co., 98 Mass. 381; Miller vs. Mut. Benefit Life Ins. Co., 31st Iowa, 210; 1 Dillon Rep. 403; 31 Mo. 725; 2 O. Rep. 379.
2. An affirmative warranty, if true when made, cannot be affected by a change in the conduct of the insured, subsequent to issuance of policy; when the warranty or representation was, that the insured was sober, subsequent bad habits constitute no bar to the recovery. Reichard vs. Manhattan Life Ins. Co., 31 Mo. 518; Bliss, page 132-69; 59 N. York, 570; 4 Barlow Rep. 462.
3. When the insured is alleged to have died from the use of intoxicating drinks, it must be proved that intemperance was the sole and proximate cause of his death. Bliss on Insurance, page 401; May on Insurance, page 330; Miller vs. Mutual Benefit Life Insurance Co., 31 Iowa, 210.
4. Fraud is never presumed, but must be proved with legal certainty. 18 An. 123; 24 An. 299.
5. On questions of facts, the decision of the lower court is entitled to great weight.

Breaux & Hall, for Defendant and Appellant:

Facts stated in application for a policy of life insurance, forming part of the contract, warranted to be true, must be strictly true; and concealments, as regards health or habits, annul the policy, whether the error of statement, or concealment, be intentional or not. May on Insurance, p. 161, § 156.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff sues as beneficiary of the insurance effected by the defendant Company on the life of her husband, who died while it was in force. The defense is simply breach of warranty, implying intemperance.

From a judgment in favor of plaintiff this appeal is taken.

A *prima facie* case having been made out, the burden of establishing the special defense, rested upon the defendant.

We have attentively read the evidence in the case. Admitting that it establishes that the insured indulged in excessive drinking, it by no means proves that he did so to excess. It surely does not show that the insured, prior to and at the time of his application, and of his answers to interrogatories propounded, was addicted to the use of intoxicating liquors to a greater extent than he had stated, and so as to impair his health materially, and to cause his death.

The District Judge, who heard and saw the witnesses, came to the same conclusion. We cannot overturn his appreciations.

The judgment appealed from is affirmed, with costs.

Mr. Justice Fenner recuses himself, having been of counsel.

No. 8348.

SUCCESSION OF J. L. SARRAZIN.

Where the heirs of an intestate have taken possession of his estate, the major heirs accepting purely and simply, and the minor heirs represented by their tutrix, an administration of the succession will not be ordered at the instance of a party who alleges that his wife is a creditor of the succession, where it is shown that the debt claimed, if ever due, was demandable for over twenty years. Judgment reversed.

APPEAL from the Civil District Court, for the Parish of Orleans. *Houston*, J.

F. D. Chrétien and *Chas. F. Claiborne*, for the Opponents and Appellants.

H. H. Walsh, for the Appellees.

The opinion of the Court was delivered by

TODD, J. This case presents a contest over an application for the appointment of an administrator to the succession of J. L. Sarrazin, under the following state of facts:

J. L. Sarrazin died on the 11th of January, 1879, intestate, leaving a widow and eleven children, four of whom are minors.

An inventory was taken in June, 1880, and the widow qualified as tutrix of the minor heirs.

On the 31st of July following, suit was instituted by the major heirs against the tutrix for a partition of the estate, and on January 18th, 1881, a judgment ordering the partition was rendered.

On the 22d of December, previous to the rendition of this judgment, Henry de Villeneuve applied to be appointed administrator of the

succession, basing his application on the fact alleged, that his wife was a creditor of the succession, charging that Sarrazin was indebted to her, on account of his administration of the succession of her mother, Marie Finance, the first wife of said Sarrazin.

To this application the heirs of Sarrazin filed an opposition on the 19th January, 1881, on the following grounds:

1. It was denied that the wife of the said applicant was a creditor of the succession, or that there were any debts owing by it.

2. It was averred that there was no necessity for an administration.

3. That the heirs of Sarrazin had accepted the succession and were in possession.

4. That a partition suit was pending, and had matured to judgment.

5. That de Villeneuve had no right to the administration.

6. That if the court appointed an administrator, one of the major heirs should be appointed, and Jules Sarrazin, one of these heirs, was designated for the appointment.

There was judgment dismissing the application of de Villeneuve, and appointing Jules Sarrazin administrator, upon his complying with the requisites of the law.

From this judgment, so far as it decreed an administration of the estate, the heirs and opponents appealed.

1st. The first question presented is, whether the wife of de Villeneuve, the applicant for the administration, is a creditor of the succession.

The record shows:

That Marie Madeleine Finance, the first wife of Sarrazin, died in 1849. Previous to her marriage with Sarrazin, she was the wife of Edmond Krebbs, of which first marriage was born Nathalie Krebbs, now the wife of de Villeneuve, the applicant for administration. Sarrazin was appointed administrator of the succession of his deceased wife, and filed his account, showing that there was due to each of her children, $482.34.

The tutor of Nathalie Krebbs, who was then a minor, gave a receipt for the sum named to Sarrazin, administrator, stating, in the body of the receipt, that this amount was coming to her from the succession of her mother, Marie Finance. The date of this receipt is the 26th of June, 1850. Nathalie Krebbs was born on the 6th of January, 1840, and consequently, attained her majority on the 6th of January, 1861.

The prescription of 2, 3, 4, 5, 10, 20 and 30 years, is pleaded by the heirs against the claim now preferred against the succession.

The contention is, that this account of administration, by Sarrazin, was incorrect. That the entire sum accounted for was received by

Sarrazin from his wife, and was her separate fund, and that there was an error in the distribution of the same. That the whole of it was owing to Mrs. de Villeneuve, as the sole legitimate child of her mother. That the other children, with whom the money was shared, were the fruit of an illicit connection between the said Sarrazin and Marie Finance, who had abandoned her husband, Edmond Krebbs, the father of Mrs. de Villeneuve.

It is further contended, that Mrs. de Villeneuve did not become acquainted with her rights to the succession, and the wrongful distribution of her mother's estate, till a short time previous to the institution of the proceedings in this case; and it is argued, from this fact, that prescription was suspended until the discovery of the real facts was made.

We hold that, whilst it is not essential that a party claiming an administration, by right of being a creditor, should make full proof of his claim, that is, as complete proof of it as if he were suing the succession for the debt, still, a court, before encumbering a succession with an administration, with its attendant costs and delays, should, at least, require a *prima facie* case of indebtedness to be made out.

In the instant case, if this debt was ever owing by J. L. Sarrazin to Mrs. de Villeneuve, conceding that a husband is entitled to be appointed administrator of a succession on account of a debt due by such succession to his wife, still we find that more than thirty years has elapsed between the date of this application and the date that this debt became demandable. And we find, also, a receipt in the record from the tutor, and at the time legal representative of Mrs. de Villeneuve, acknowledging the payment by Sarrazin of all that he was owing her on account of his administration of the estate of her mother, on which account the present claim is preferred. Against this claim we find, also, that prescription has been pleaded, as stated.

While we do not decide that the succession of Sarrazin is not indebted to Mrs. Villeneuve, and do not determine whether or not the plea of prescription should prevail against the claim, preferring that these issues should be settled in another form of controversy and under different pleadings, yet we conclude, under all the circumstances of the case, that the applicant is not entitled to demand an administration of this succession.

2d. Among the circumstances which have induced the conclusion stated, besides the character of the proof administered in support of the claim, is the fact that the heirs of age have accepted the succession purely and simply, have sued for the partition of it, and the entire estate is in possession of the major and minor heirs. That the minor heirs are represented by their tutrix, and no obstacle whatever exists

to the recovery of this claim of Mrs. de Villeneuve in a suit against the heirs of age and the tutrix of the minor heirs. They, together, represent the deceased, and can stand in judgment, as has been frequently decided. See case of Soye vs. Price, 30 An. 93, and authorities there cited.

We find no sufficient reason why this succession should be placed under administration.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and that the opposition of the opponents be sustained, and the demand for an administration of the succession of J. L. Sarrazin, be rejected, at the costs of the applicant, Henry de Villeneuve, in both Courts.

No. 7850.

MARY C. THORNHILL VS. THE STATE NATIONAL BANK.

1. Where a judgment recites, upon its face, the consent of the defendant "given in open court," citation and default are unnecessary; the consent so given need not be in writing; and the fact and sufficiency of the consent will be presumed, unless the contrary be made to appear. 29 An. 557; 11 An. 280.
2. A married woman, with the authority of her husband, has power to make a compromise. 26 An. 289.
3. A married woman, authorized by her husband, may mortgage her separate property for her separate debt, without prior examination by a Judge and compliance with other requisites of Rev. Stats., Secs. 2432 *et seq*; 15 An. 54.
4. Where the effect of a compromise and of judicial proceedings in execution thereof, consented by a married woman, authorized by her husband, is merely to subject her separate property to the payment of her separate debt, she will be held bound thereby.
5. Where a married woman, after being examined by the Judge apart from her husband, admits in open court that the claim sued on enured to her separate benefit, she will not be permitted thereafter to contradict such admission as a ground for attacking the judgment.
6. Where a compromise and judgment, such as above indicated, have been voluntarily executed by the woman, after her widowhood, they will be thereby conclusively ratified.

APPEAL from the Fourth District Court for the Parish of Orleans. *Houston*, J.

H. B. Magruder and *F. L. Richardson*, for Plaintiff and Appellant:

1. A judgment without citation is an absolute nullity, and any one having the least interest may annul a judgment for want of citation. 1 N. S. p. 9; 2 L. 169; 30 An. 147; C. P. 606.
2. Courts will presume nothing with reference to a party being cited. Knowledge of the suit on the part of the defendant, no matter how clearly brought home, will not suffice if this formality has not been complied with. Proof of citation is not a matter *en pais*. 2 L. 169; 8. N. S. 145; 21 An. 27; 5 N. S. 429.
3. Parol testimony cannot be admitted to supply any defect or omission in a suit after final judgment, especially can it not be admitted to show that essential prerequisites of a valid judgment were complied with, but not made matters of record. Such corrections could not be made even on a new trial.

4. A married woman is not estopped by a confession of judgment from attacking it, when the debt for which it was confessed did not enure to her separate benefit or that of her separate estate. 15 An. 628; 23 An. 325; 14 An. 169; 28 An. 840.
5. To recover against a married woman, it must be alleged and shown affirmatively that the debt enured to her separate benefit. 20 An. 229; 24 An. 95; 9 An. 268.
6. A mortgage on paraphernal property, for the benefit of the husband or a firm of which he is a member, whether placed there by the wife herself, or by a third person claiming to be the owner of the property, cannot be ratified. The law which forbids such encumbrance of paraphernalia is prohibitory. 15 An. 569; 14 An. 169; 30 An. 813; 26 An. 737; 6 R. 331.
7. The intent to ratify an invalid act must be clear, and leave no doubt. Especially in this case when the ratification is tacit. C. C. 2272; 23 An. 538; 13 L. 176.
8. If it is a condition of an act, called a compromise, that one party shall purchase from the other a plantation, the purchase is not a ratification, if the title is void, unless the purchaser knew it at the time of signing the compromise.

J. McConnell, for Defendant and Appellee:

1. A married woman, aided and assisted by her husband, can, without judicial authorization, make a valid compromise for the purpose of preventing or putting an end to a law suit. C. C. 3071, 3072, 3101, 1786; Maria L. Baron vs. Solibellos, 26 An. 289.
2. Where such transaction or compromise has been made by a married woman, it has the force of the thing adjudged, and "she cannot then be listened to when saying that the debt compromised was the debt of her husband." Maria L. Baron vs. Solibellos, 26 An. 289; C. C. 3078.
3. Unauthorized contracts made by married women, may be made valid after the marriage is dissolved by express or implied ratification. C. C. 1786.

The voluntary execution of the obligation is sufficient, if made subsequently to the period at which the obligation could have been validly confirmed or ratified. C. C. 2272; see also, C. P. 612.

A contract made by a *femme couverte* is ratified by a partial payment after she becomes a *femme sole*. Tucker vs. Lisle, 4 La. 328; see also, 7 La. 76, and 2 Rob. 2.

4. A promise to pay a debt due by a deceased husband, made by the wife subsequently to his death, when the marital authority had ceased, is binding on the wife. Succession of Guidry, 4 An. 488.
5. A consent to judgment being rendered need not be in writing; it may be given verbally and in open court. "And where a decree of court is rendered 'by reason of the consent of parties plaintiff and defendant,' it does not matter whether the consent was given in writing or verbally, it will be presumed, until the contrary is made to appear to have been given in such a way as to justify the decree." Woodward vs. Lurty, 11 An. 280, 282.
6. Neither citation nor default is necessary to the validity of a judgment based on the confession of defendant. Marbury & Crossley vs. Pace 29 An. 557; see also, 5 Rob. 447, and 9 La. 411.

The opinion of the Court was delivered by

FENNER, J. The "Acquasco Plantation," situated in Tensas Parish, from the year 1844 had belonged jointly to Mrs. G. C. Covington and her children, the latter, as heirs of their father, Levin Covington, who died in 1844. The mother had, however, always administered and cultivated it.

In 1866, Mrs. Covington, being indebted to her factors, R. W. Estlin & Co., executed a mortgage on the plantation in favor of them, or any future holders, to secure the payment of twenty promissory notes,

drawn by herself, to her own order and by her endorsed, aggregating the sum of $23,299.38.

Five of these notes were paid, and the defendant Bank became, in due course of business, holders of the remaining fifteen, amounting in principal to $18,299.35, with interest at six per cent. from January 1st, 1866.

On the 11th November, 1869, the plaintiff and her sister, Mrs. Sue Covington Buckner, co-owners, with their mother, of the plantation, addressed a communication to the Bank, in which they referred to the above mortgage as having been consented by their mother without consultation with them, and stated that their mother was only owner of part of the plantation, and that they understood that a large portion of the debt, for which the mortgage was given, had not enured to their benefit; and they then proposed, "for the sake of a compromise and amicable adjustment of the debt," to recognize the validity of the mortgage on one-half of the plantation. This communication led to negotiations between the parties for a settlement, which resulted finally in a notarial act of compromise, signed by the Bank and other parties interested in the notes, on the one hand, and by Mrs. Covington, by the plaintiff, and by Mrs. Buckner, and by the husbands of the two last named ladies, to authorize them. This act recites the execution of the mortgage by Mrs. Covington alone; states the ownership of the property by her and her children; admits "that the consideration of the mortgage enured to the benefit of said plantation, * * * and, therefore, is a just debt upon the same, and due by the owners," and culminates in an agreement to the effect that suit should be brought and judgment rendered in favor of the Bank, for its full claim, and with recognition of the mortgage; that execution should issue *instanter*, under which the property should be sold for cash, and bought in "by said mortgagor and said co-heirs, or any one they may designate;" and the mortgagees agreed to reduce their claim to the principal alone, abandoning the accrued interest, and further, to extend the time of payment to one, two and three years from the date of the act, in equal instalments and without interest.

In execution of this settlement, suit was instituted by the Bank against Mrs. Covington, and against the plaintiff and Mrs. Buckner and their husbands to authorize them. In the petition, it was alleged that the mortgage was executed by Mrs. Covington alone; that the other defendants were co-owners of the plantation, but that the debt enured to the benefit of all the parties, and that they all had knowingly approved and ratified the mortgage.

An answer was filed, signed by plaintiff and Mrs. Buckner and their husbands, accepting service of petition, waiving citation, admitting the

truth and justice of the claim, and consenting to the judgment and recognition of the mortgage. In addition thereto, the two married women were examined by the Judge, apart from their husbands, and their consent was given in open court, and entered in the note of evidence in the cause.

All the parties attended in open court, and judgment was rendered as follows:

"Considering the law and the evidence, and considering the consent of the several defendants, given in open court, that judgment should be rendered as prayed for; and the court, having examined in chambers said defendants, Mrs. M. C. Thornhill and Mrs. Buckner, separate and apart from their husbands, touching the objects for which the mortgage was contracted, and being satisfied that same was not for said husband's debts, etc., but did enure to the benefit of the separate property of said defendants, * * * it is ordered, adjudged, etc.," proceeding to give personal judgment against Mrs. Covington, and to recognize the mortgage, and order the sale of the property for cash, to pay the debt.

Under writ of *fi. fa.*, the property was sold and was adjudicated to the Bank. Shortly thereafter, the Bank conveyed the property to the plaintiff, Mrs. Thornhill, who had then become a *femme sole*, the act itself containing clear, internal evidence that the conveyance was made in execution of the compromise, and upon the terms therein agreed upon.

Mrs. Thornhill entered into possession under this title, and so remained for several years, without disputing the rights of the Bank, making one partial payment on the price, and excusing her defaults in payment on grounds of poor crops, losses by overflow, etc.

Finally, in 1875, discovering that the Bank had neglected to record its deed to her in the mortgage office, without notice to the Bank, she sold and delivered the property to one Moreland for $20,000, taking his notes in payment.

On learning this the Bank was driven to a suit to rescind the sale for breach of the resolutory condition of non-payment of the price.

Thereafter, plaintiff instituted the present suit, the object of which is to annul the judgment which was rendered, as we have seen, in execution of the compromise, and under which the property was sold to the Bank.

The grounds of nullity urged are:

1. That the judgment was rendered against Mrs. G. C. Covington, without citation.

2. That the mortgage enforced by said judgment was null, because it was a mortgage on the property of others than the mortgagor.

3. That, being absolutely null, the mortgage was not susceptible

of implied ratification, and that such ratification, if implied from the compromise and judicial proceedings herein, would have the effect of encumbering paraphernal property, without previous authority of the Judge and compliance with the formalities prescribed by law.

4. That the Bank, having derived the mortgage notes from R. W. Estlin & Co., of which firm Henry Thornhill, the husband of plaintiff, was a member, said firm and said Thornhill, *in solido*, were liable to the Bank on said notes, and that the proceedings had the effect of mortgaging the paraphernal property for a debt for which he was liable, which could not be legally done.

I.

The first ground has no foundation. The judgment shows upon its face the consent of Mrs. Covington, "given in open court, that judgment should be rendered as prayed for." Such voluntary appearance cures the want of citation and renders default unnecessary. Marbury vs. Crossley, 29 An. 557.

The consent, being given in open court, was sufficient to sustain the judgment, whether given verbally or in writing; and when the judgment recites that consent was so given, the fact of the consent and of its sufficiency will be presumed, unless the contrary be made to appear. Woodward vs. Lurty, 11 An. 280.

In absence of proof to contradict the recital of the judgment, it could not be assailed on this ground; but here positive proof is administered that Mrs. Covington did so appear and so consent, which is uncontradicted.

II.

The other grounds may be considered *in globo*.

They are all concluded, in our judgment, by the compromise and judicial proceedings in execution thereof, and by the acts of plaintiff herself, after the death of her husband, when her capacity was unlimited.

At the time when the compromise was entered into, the Bank and other parties thereto were holders of the mortgage notes, transferred without the endorsement of R. W. Estlin & Co., and on which said firm is not shown to have been, in any manner, liable to them. This obviates all objections based upon the charge that the debt, settled and secured by the compromise and judicial proceedings, was a debt of plaintiff's husband.

If the debt evidenced by said notes enured to the benefit of plaintiff and of her separate property, it is clear that she and her separate property were liable therefor. Dickerman vs. Reagan, 2 An. 440; 5 An. 126; 6 An. 121; 8 An. 512; 14 An. 194.

She would have had the right, at that time, with the authorization of her husband, to mortgage her separate property for the security of such a debt. The pretension that prior examination by the Judge, and compliance with other formalities prescribed by the Act of 1850, now Rev. Stat. Secs. 2432, *et seq.*, are essential to the validity of such a mortgage, is groundless. It was long since settled that this legislation did not impair the previous provisions of law in regard to the contracts of married women, but only furnished a mode by which their contracts might be made to furnish full proof against them. Rice vs. Alexander, 15 An. 54.

A married woman may sell her paraphernal property, with the authorization of her husband, and may undoubtedly mortgage it for her separate debt, with like authority, subject only to the condition that the party taking such mortgage incurs the responsibility of establishing that it did enure to her separate benefit.

The authority of a married woman to make a compromise, with the authority of her husband, has been judicially determined. Barron vs. Sollibellos, 26 An. 289.

The effect of the compromise, and of the judicial proceedings based thereon, was only to effect that which the plaintiff would have had the unquestioned right to do, assuming that the debt was her separate debt, viz: to subject her separate property to the payment thereof.

Can the plaintiff be heard to deny that the debt did enure to her separate benefit? We think not. She was a party to the suit in which the judgment assailed was rendered, and she judicially confessed this fact.

The cases suggesting that a married woman is not estopped from attacking her own judicial confession are based entirely upon the supposition that such confession may have been induced by marital influence. But, in the present case, the Judge, before acting on her confession, examined her, separate and apart from her husband, about the nature of the debt, and satisfied himself touching the same and touching the freedom of her action, and her admissions made in open court form part of the evidence.

Judicial proceedings against married women would be a farce if, under such circumstances, a married woman could go behind her own judicial confessions and admissions. Aubie vs. Gill, 2 An. 343; Dickerman vs. Reagan, 2 An. 440; McComas vs. Green, 6 An. 121.

But the voluntary acts of plaintiff after the death of her husband, in execution of the compromise, are a conclusive ratification thereof, and make it absolutely binding upon her.

Nothing could be clearer, from a mere inspection of the compromise

and the act of sale to plaintiff, than that the latter was made in execution of the former.

By accepting title, she voluntarily executed the compromise and forever estopped herself from questioning its validity.

The evidence satisfies us that this ratification was made with full knowledge of every fact essential to an understanding of the entire transaction; and that the present assault was prompted, not by the discovery of any new fact affecting the same, but simply by the discovery that the Bank had neglected to record its deed in the mortgage office, and by the opportunity thus afforded, to sell the property, free from the Bank's mortgage and lien.

Judgment affirmed, at appellant's cost.

No. 8650.

THE STATE OF LOUISIANA EX REL. CHISM & BOYD VS. THE JUDGE OF THE TWENTY-SIXTH DISTRICT COURT FOR THE PARISH OF ST. CHARLES.

Where a suit is on unconditional obligations to pay specific sums of money, and the defendant does not bring himself within either of the exceptions provided by C. P. 494, the District Judge has no right to order a trial by jury, and must pass upon the case itself.

A *mandamus* lies to compel the trial of a case, where the Judge has illegally refused to go into the merits of the action upon an erroneous construction of some question of practice preliminary to the whole case. *Mandamus* peremptory.

APPLICATION for a Mandamus.

Berault & Legendre, for the Relators:

Relators, holders of the two promissory notes made by Joseph Deynoodt, whereby the latter promises to pay, absolutely and unconditionally, a certain sum of money at a time specified therein. Story, Promissory Notes, § 1.

Suit No. 120 is based exclusively on those notes and on unconditional obligations to pay specific sums of money, and "shall be tried without a jury," C. P. 494, and by the Judge alone.

The original and supplemental answers in No. 120 are "*sans*" allegation—"*sans*" affidavit, to entitle the maker of those notes and obligations to a trial by jury. C. P. 494.

The sworn responses to the interrogatories on facts and articles cannot supply the fatal omission. Besides, those responses speak only of *remission* and are not within any one of the exceptions of C. P. 494.

Suit No. 120 is similar to that of Lanata vs. Bayhi, 31 An. p. 229, from which we give extracts at pp. 10-11 of our brief.

Jas. D. Augustin, for the Respondent:

Mandamus cannot issue when there is adequate remedy by appeal; nor in matters of discretion of the Judge *a quo;* nor to force him to decide an issue in a particular way, the remedy is by appeal. 2 An., 779; 3 An. 716; 8 An. 92; 9 An. 250; 10 An. 420; 15 L. 521; 13 An. 481-483; 17 An. 288-328; 23 An. 766; 28 An. 889.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus* to compel a District Judge to determine a suit brought before the court over which he presides, and referred by him, for trial, to a jury.

The suit is upon promissory notes, secured by a pledge of certain property.

The defense was a general denial. The defendant further alleged that the obligations sued on are not unconditional, that if an indebtedness ever existed, it was remitted and extinguished by the plaintiffs.

On an *ex parte* representation that the case offers a great many issues of fact that appropriately pertain to the province of a jury, the court ordered that a trial by jury be granted.

The present proceeding has for its object to require the District Judge to try the case himself, the suit being one on unconditional obligations to pay specific sums of money, and the defendant not having brought himself within any of the exceptions on which the case can be removed from the court's docket to that of the jury.

Our right to revise the action of the District Judge in the present proceeding cannot be questioned.

A *mandamus* is often sought and obtained to set in motion a judicial officer who is unwilling to proceed with the decision of a cause instituted before his court, the plaintiff therein having an absolute right to a determination of his action in the form and manner prescribed by law. 32 An. 542, 597, 774; 33 An. 1070, 1096, 1351; High on Ex. Rem., § 250.

"A distinction is recognized between cases where it is sought by *mandamus* to control the decision of the inferior court, on the *merits* of a cause, and cases where it has refused to go into the merits of the action, upon an erroneous construction of some question of law or practice preliminary to the whole case." High on Ex. Rem., § 151.

The authorities, to which the defendant has called our attention, are cases in which the rulings were made at times when the jurisdiction of this Court was appellate only. In the exercise of the powers conferred upon it by Article 90 of the present Constitution, this Court feels justified in interfering in the present case, in which, otherwise, the ruling made might prove a denial of justice. Its appealable character is of no significance.

We think that the District Judge has erroneously determined a question of *practice* preliminary to the trial of the whole case.

The notes sued upon are in the stereotyped form in which promissory notes are habitually made. They are, unquestionably, on their face, unconditional obligations to pay specific sums of money. The suit is *via ordinaria*. The act of pledge, with which the notes are identified

by the notary's paraph, was not intended to change their character, and did not do so. The question of the *quantum* of liability of the defendant is purely a matter of evidence.

The defendant does not pretend that his signature to the notes is not genuine, or that he expects to prove that the same had been obtained through fraud or error, or want of consideration; neither does he set up a plea of compensation or reconvention. His defense, whatever it be, is unsworn. His oath to answers to interrogatories does not form part of the pleadings and does not cure the omission.

The spirit and letter of the law on this subject are too plain to be misunderstood and misapplied. Under the formal behest of the law, cases of this description "*shall be tried without a jury*," unless the defendant shall make one of the averments stated, verified by his oath. C. P. 494.

It may be that, on the trial of their case, the jury might do the plaintiffs full justice. It is possible, also, that the verdict may go against them for the whole or for part of their demand. It is not improbable that the jury may not agree and, therefore, that such mistrial may postpone injuriously a decision of his case. But those hypotheses have nothing to do in this case.

It is enough that the law provides that such a suit on unconditional obligations to pay specific sums of money shall be tried without a jury, and that the defendant has not brought himself within any of the exceptions in which he might have had it been removed from the Judge's docket to that of the jury.

The defendant Judge exercised no legal discretion in ordering the trial of the case in a manner unauthorized or forbidden by law. In the absence of a proper technical defense, it was his bounden and unavoidable duty to try the case *himself*.

The Relators are of right entitled to the relief sought.

It is, therefore, ordered and decreed, that the alternative *mandamus* herein issued be made peremptory, as prayed for.

No. 7839.

MRS. ANNIE HUYGHE VS. HENRY BRINKMAN.

A judgment of ejectment of a party as tenant by a Justice Court will not sustain the exception of *res judicata* in an action by the party ejected, for possession *as owner* of the same premises.

APPEAL from the Fifth District Court for the Parish of Orleans. *Rogers*, J.

J. O. Nixon, Jr., for Plaintiff and Appellant.

Bayne & Denègre, for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff appeals from a judgment maintaining an exception of *res judicata* to her possessory action, as owner of an immovable property, from which she had been unlawfully evicted. Defendant's plea is predicated on a judgment by a justice court, in his suit for the expulsion of the plaintiff in this case from the same tract of land, under the allegation that she was his tenant.

It is elementary, that to constitute *res judicata*, the thing demanded must be the same and the demand must be founded on the same cause of action.

The thing demanded in the former case was possession as lessor; the thing demanded in the present case is possession as owner; the cause of the action in the case invoked was the refusal of possession of a tenant to his landlord; the cause of action in the suit at bar is disturbance of possession as owner.

From the very composition of the court which rendered the previous judgment, it is apparent that the question of possession as owner could not be an issue in the cause; and hence it follows that, if such an issue had been presented and adjudicated upon, the judgment rendered would be absolutely null, for want of jurisdiction *ratione materiæ* in the court which had rendered it.

The argument that the right of possession as owner was the defense which Mrs. Huyghe should have urged in the ejectment suit, and that such a point properly belonged to the decision of the cause, falls of its own weight, when met by the fact that the court was without jurisdiction to entertain and pass upon such an issue.

As the issue was not made, it was not decided; if it had been made, it could not have been entertained or decided. Hence, it cannot be considered as an element of the judgment and, therefore, it cannot be invoked as an estoppel to the present action. Thompson vs. Nicholson, 12 R. 327; Kling vs. Séjour, 4 An. 128.

The judgment of the lower court is, therefore, annulled and reversed, the exception of *res judicata* is overruled, and the cause is remanded to the Civil District Court, Parish of Orleans, to be proceeded with according to law, appellee to pay costs of appeal.

Rehearing refused.

No. 8679.

WM. T. LEVINE ET AL. VS. BERNARD MICHELL.

The right of appeal from an interlocutory decree dissolving an injunction on bond, under Art 307, Code of Practice, must be tested by the nature of the damages complained of in the petition for injunction.

If, from the pleadings it appears that such damages can be compensated in money, or otherwise repaired, the injury caused by the order is not irreparable, and no appeal will lie therefrom. Previous decisions affirmed.

APPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Livaudais*, J.

J. R. Beckwith, for Plaintiffs and Appellants:

F. C. Zacharie and *E. H. McCaleb*, for Defendant and Appellee:

1. The order appealed from does not work irreparable injury. C. P. 307; 2 An. 321; 4 An. 147; 12 R. 489; 11 An. 40; 14 An. 847.
2. This Court has no jurisdiction in the case where the appeal is taken from an interlocutory order dissolving an injunction on bond, unless the damage complained of works an irreparable injury. (Same authorities as above.) 14 An. 57; 23 An. 152; 29 An. 360; 32 An. 1192; 33 An. 133; 33 An. 943; 33 An. 760; 33 An. 930.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs, composing "the Branch Pilots' Association of the Port of New Orleans," obtained an injunction on a bond of five hundred dollars, restraining the defendant, one of their associates, from pursuing the business of piloting vessels in and out of the port of New Orleans, independently of said association of pilots, and from violating any of his obligations as a member of said Association pending the suit filed against him, for the purpose of enforcing specific performance of his obligations as a member of the same.

On defendant's motion, the court issued an order dissolving the injunction, under a bond of five hundred dollars, in accordance with the provisions of Art. 307 of the Code of Practice.

Whereupon plaintiffs obtained a suspensive appeal from the decree dissolving the injunction on bond, by a petition in which they allege the irreparable character of the damages complained of in their injunction proceedings. Defendant's motion to dismiss the appeal is predicated substantially on the ground that the interlocutory decree appealed from does not work irreparable injury and that the matter is not appealable.

The rule is now well established, that the test of the right of appeal must be found in the consideration of the character of the damages complained of, and that for the purpose of such examination the facts

alleged in the petition for injunction must be taken as true, and furnish the vital point of the investigation.

Plaintiffs charge, in substance, that in wanton violation of his covenant as a member of the Pilots' Association, the defendant has wilfully and fraudulently engaged in the business of carrying on pilotage outside of the Association; appropriating to himself all fees and emoluments thus earned and received, instead of accounting therefor to the Association; by which course of conduct, in which he will persist if not enjoined, he will cause said Association "*irreparable injury exceeding the sum of two thousand dollars.*" It strikes us that, tested under their own allegations, the damages which may be suffered by plaintiffs through the acts of defendant can be measured in money, and are therefore not irreparable.

By the very means of observation through which plaintiffs have detected and are able to enumerate the acts of defendant in boarding vessels and piloting them, they are afforded an efficient method of computing the damages which the defendant will cause to the Association, pending the litigation which will finally adjust the conflicting claims of all parties to the suit.

Plaintiffs' counsel bitterly denounces the jurisprudence which has so signally misconstrued a provision of law; and thus enables an enjoined defendant, by means of an insignificant bond of five hundred dollars, to continue in the performance of his illegal acts, thus "provisionally chartering crime and wrong."

In advancing these views, and in advocating a construction under which a defendant, in such an injunction, would be deprived of the right of dissolving the same on bond, counsel loses sight of the fact that, on furnishing an insignificant bond of five hundred dollars, these plaintiffs have suddenly, without warning, and for an indefinite time, paralyzed and checked the defendant from the pursuit of a calling useful to commerce and profitable to himself, in anticipation of a judgment which may deny him that right, but which may on the other hand maintain him in the pursuit of that identical business.

It has been held, that "the power given by Art. 307 is one highly conducive to the administration of justice," and we see no circumstances in this cause which would justify a denial of its conservative relief to the defendant in this case.

The rule which we enforce in this instance is well recognized in our jurisprudence, and we have had several recent occasions to consider and to re-affirm it as legal and wise.

Plaintiffs' counsel has built all his hopes of success in maintaining his present appeal in an elaborate effort to obtain a revolution in our

established jurisprudence, which he violently assails in a brief which will receive proper notice in another proceeding.

Further consideration of the subject has led us to the conclusion that our reasoning in this opinion is staunchly supported by a formidable array of authorities, among which we quote the following cases: Jure vs. City of New Orleans, 2 An. 321; Stetson vs. City of New Orleans, 12 Robinson, 489; Cobb vs. Parham, 4 An. 147; Delacroix vs. Villeré, 11 An. 40; Anderson vs. Smith, 28 An. 649; State ex rel. Cummings vs. Judge, 29 An. 360; Crescent City Live Stock Company vs. Police Jury, 32 An, 1192; State ex rel. Sigur vs. Judge, 33 An. 133; Osgood vs. Black, 33 An. 493; State ex rel. Gravois vs. Judge, 33 An. 760; C. C. La. Co. vs. Butcher's Union, 33 An. 930.

This appeal is, therefore, dismissed, at appellants' costs.

By BERMUDEZ, C. J.:

The brief filed by counsel, in opposition to the motion to dismiss, in the case of Levine vs. Michell, just decided, is in tone and substance, highly indecorous.

It is an unmitigated, contemptuous and unfounded attack upon the laws, the jurisprudence, the practice and the judicial system of the State.

It assails and denounces, in most unacceptable terms, the application which the highest court of the State has successively, for a long series of years, made of those laws under the jurisprudence and that practice, notably in the case of Osgood, 33 An. 498, with which this attorney was connected.

The disrespectful form and mode in which the attack was made, and in which our own ruling, in two cases, was criticised, (33 An. 498 and 133) are clearly and justly offensive to the Court.

The respect which we owe to the judicial power which we represent forbids that we should tolerate such conduct.

We might, in the exercise of our inherent powers, apply the law with rigor, but we will not do so.

Counsel having violated the known rules of decorum by which, everywhere, the intercourse between bench and bar has invariably been guided, his brief cannot be permitted to remain of record.

It is, therefore, ordered, that the clerk of this Court do expunge from the files of the case the brief in question, submitted by its author, J. R. Beckwith, Esq.

No. 7600.

WIDOW LEDOUX ET AL. VS. JAMES WEST.

In establishing a servitude upon a strip of ground for an alley way, the ground being described not only by boundaries but the dimensions in feet being also stated, and the proof being that the alley had never extended beyond the number of feet stated, and was only of that extent and dimensions when the servitude was created, *held;* —that such sale was not *per aversionem*, and the servitude existed only upon the ground to the extent enumerated in the Act of sale, since it conformed to the quantity actually devoted to such use at the time of sale.

Servitudes not being susceptible of actual delivery, the use which the owner of the estate makes of them determines their extent.

APPEAL from the Third District Court for the Parish of Orleans. *Monroe*, J.

Mott, Kelly & Saunders, Bayne & Denègre and *H. Renshaw, Jr.*, for Plaintiffs and Appellees.

Henry P. Dart, for Defendant and Appellant:

I.

1. The proprietor of a private way who sells the privilege and use thereof to another, creates thereby a conventional servitude—no matter by what name he designates the thing sold. C. C. 754, 756.
2. Such sale does not divest the vendor or ownership of the land; (C. C. 658), and words indicative of the sale of use in perpetuity are merely to prevent dissolution of right on grantee's death. C. C. 719, 758.
3. A sale of this nature must be interpreted by the laws regulating servitudes, not those concerning sales of land, and in case of doubt, as to extent of grant, the interpretation is always in favor of property to be affected. C. C. 753. And his heirs and assigns are concluded by the use made thereof by the grantee. C. C. 743.
4. The action to recover the servitude thus granted is petitory. C. P. 45; Mackeldey Com. C. L., Tit. Serv., p. 352; (Kaufman's Ed., 1845); 1 R. 251; 10 Howard, 257; and plaintiff must make out his title, otherwise defendant will be discharged. C. P. 44; 33 An. 250.

II.

1. This servitude is extinguished by non-user during ten years. C. C. 789; 12 M. 70; 1 R. 321. And if used in less extent than granted, will be reduced to that extent. C. C. 794, 796, 798; the extinguishment being based on the presumed abandonment of the right. *Ib.*
2. Once prescribed against, the servitude in question can only be replaced by a title or judgment condemning the owner of the fee to permit the exercise. No other evidence can be received to show re-establishment of alley—prescription once accomplished. C. C. 765, 767, 770; Burke vs. Wall, 29 An. 43.
3. The prescription of non-use opposed to this action threw on plaintiff the burden of proving such acts as will take his case out of the rule. C. C. 804; 12 M 70; 1 R. 321.

The opinion of the Court was delivered by

MANNING, J. The plaintiffs own three lots, Nos. 110, 112, and 114 St. Charles street, which have the same depth so that their rear lines form one straight line. The defendant owns a lot which fronts on North street, and is separated on the side from the rear of the plaintiffs' lots by an alley four feet in width. The length of this alley is

the matter in controversy, the plaintiffs asserting that it extends from North street the entire rear line of their lots, and the entire side line of defendant's lot, while the defendant maintains that it stops short of that distance. According to the plaintiffs' assertion it is seventy-four feet and a fraction in length. The defendant maintains it is fifty-six feet only. The plaintiffs claim a servitude and right of way upon and through the alley the full distance of the rear line of their lots, and the defendant resists it.

L. S. Parmly owned the defendant's lot and others adjoining it in 1846, and built upon them then, and opened an alley way along his side line. Ameron Ledoux owned the plaintiffs' lots.

In April, 1847, Parmly sold to Ledoux for five hundred dollars the privilege and use of an alley having four feet in width fronting on North street, and running back along the property of Ledoux to the rear line of said property, that is to say to the depth of about fifty-nine feet, which alley is intended shall be used in common by them, their heirs and assigns forever, the use of the same being purchased for the benefit of the property of Ledoux.

The words—that is to say to the depth of about fifty-nine feet—are not in the body of the Act, but were added at the close, and before it was signed, and it is not disputed, with the knowledge and assent of both parties.

At the time of this purchase the alley was open from North street to the depth or length of fifty-six feet, at which point there was a gate. This gate was put there by Parmly when he made the alley—was there when he sold the right of way to Ledoux—and has been there ever since. In other words the alley, as made or opened by Parmly, did not extend beyond this gate, and has not been extended beyond it at any time. There was never an opened alley way along the whole rear line of the plaintiffs' lots, but only to this gate. Ledoux lived twenty-three years after his purchase of the right of way and never made claim to the use of an alley beyond the gate, this suit having been instituted by his widow and others deriving title from him in 1878.

The plaintiffs contend that the description in the Act of the property upon which the servitude was created constitute it a sale *per aversionem*, and that the specification of the boundaries controls the enumeration of quantity, and if there was error in the latter there was and could be none in the former, and hence the alley must run back along the property of Ledoux to its rear line, and is not restricted to the depth of fifty-nine feet or thereabout.

There cannot be any doubt as to what a sale *per aversionem* is, as defined by writers, and explained and interpreted by judicial decisions.

The only controversy here is whether this sale, in manner and form as already set forth, is within that definition. We do not think it is.

The description of the alley by boundaries in the Act, as drafted by the notary, extends it along Ledoux' property to the rear line of that property. The vendor evidently apprehended that such would or might be its construction. Both parties knew that in fact the alley did not extend that distance—was not opened along the whole of Ledoux' property—but that it was terminated by a gate distant from North street somewhat more than fifty feet. The precise number of feet was not known or recollected. The actual distance we now know was fifty-six feet. The notary was directed to state at the end of the Act it was about fifty-nine feet, and it cannot reasonably be doubted that this care was taken to alter the description so as to negative the construction that the language, if unaltered, would justify. Ledoux so understood it, and acted on that understanding for near a quarter of a century.

Servitudes are not susceptible of real delivery, and hence the use, which the owner of the estate to whom the servitude is granted makes of this right, supplies the place of delivery. Rev. Civ. Code, Art. 743. The use which Ledoux made of his right conforms to the enumeration of quantity in the Act, and shews that such enumeration was intended to control the specification of boundaries.

Ledoux' object in the purchase of the servitude was the benefit of his property, and the manner in which he exercised his right shews its extent. Lot 114 has never had an opening into the alley. The other two have, and the obstructions complained of are in the rear of a portion of lot 110. There is a door or gate in the rear wall of that lot abutting the alley, giving ingress and egress to and from the alley, which is neither hindered nor obstructed by the gate across the alley. Construing the Act of purchase as restricted to "about fifty-nine feet" of alley way (fifty-six in fact) the purchaser has for the lot most affected the benefit of a way which is shewn by his own acquiescence to have been of no greater extent than the quantity specifically stated in the Act.

It is argued by the plaintiffs that the defendant is estopped from denying that the alley extends the entire distance from North street to the rear line of their property, because of the description of his own property in his Act of purchase.

West acquired from Parmly through mesne conveyances, and the description, after giving the number and dimensions of the lot, adds "between parallel lines, with the use of a privy in the rear, and the right of the alley leading thereto (which said privy is to be kept in order at the expense of the owners of lots one, two, and three) being a

portion of the property," etc. To comprehend this, it must be stated that Parmly's property, as owned by him when he made the alley in 1846, was afterwards divided into three lots, and acquired by different persons, the defendant's lot being No. 3. There was a privy built on the rear part of No. 3 which was common to Nos. 1 and 2—was for the use of the three lots. In selling one of these lots, it was a necessary provision to give access to the privy, and therefore a right of way through the alley leading thereto was stipulated for lot No. 3 as against the owners of the two other lots.

But that was Parmly's affair, not Ledoux'. It was a stipulation to secure the owners of three lots into which Parmly's property was divided in the use of a right common to all of them. The privy was to be kept in order by the owners of those three lots. If the owner of either of the other lots had prevented West from enjoying his easement, he could have set up his own title in vindication of his right to it.

But if West acquired such right from Parmly as against lots one and two, that does not enlarge the right which Ledoux acquired for a different purpose for his own lot on the opposite side of the alley. And besides, the stipulation of Parmly in favor of West may well be considered as referring to the passage way common to Parmly's three lots.

The judgment of the lower Court was erroneous. Therefore,

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that there be now judgment in favor of the defendant James West against the plaintiffs herein, rejecting their demand, and that he have and recover of them his costs in the lower court and the costs of this appeal.

Rehearing refused.

No. 8536.

IN THE MATTER OF THE SUCCESSIONS OF ZENON AND ELISE LABAUVE. OPPOSITIONS OF BARROW & POPE, HERRON & GALLAGHER AND ANDREW CANEZA.

1. Where an attorney-at-law is employed to collect certain judgments, his fees are not exigible until the judgments are collected or their collection shown to be impossible.
2. The death of the client does not dissolve such contracts, and the attorney can and should continue his services to accomplish the purpose of his employment, unless prohibited to do so by the legal representative of the accused. And where the attorney is not thus forbidden to act, the death of the client does not have the effect of itself to make the fees of the attorney exigible. Judgment amended.

APPEAL from the Twenty-third District Court, Parish of Iberville. *Cole*, J.

Barrow & Pope, for Opponents and Appellees:

1. Fees of attorneys are to be measured by: 1st. Extent of legal knowledge. 2d. The responsibility incurred. 3d. The difficulties of the case. 4th. The amount in controversy. 5th. The physical and mental labor incurred. 6th. The usual charges for similar services. 21 An. 687; 30 An. 463; 6 N. S. 399.
2. The opinions of the members of the local bar as to value of attorney's fees, while not conclusive, will be considered by the court when corroborated by the record, and when services do not fully appear of record, the court will be entirely governed thereby. 30 An. 463, Succession D. P. Jackson; 11 An. 637, Brewer vs. Cook.
3. A retainer of counsel to attend to the preservation or collection of certain judgments, without a stipulation of labor to be performed and the compensation to be paid, does not constitute such a contract that counsel could demand to be retained until the judgments are collected. 10 W. 496.
4. Under such an employment counsel is entitled at the determination of his employment to be paid for services rendered.
5. The death of the client ends the employment of counsel. He cannot appear for the heirs of the administrator without a new retainer. Stith vs. Wenbash, 3 La. 442; C. C. 3027; 4 Mit. 333; 1 Man. & S., 74, 76.
6. Employment of new counsel on new argument would discharge former counsel. 10 Wall. 496.
7. The fee for services rendered is independent of the benefit received, where there has not been negligence, want of skill or a stipulation to the contrary. Labor is to be rewarded in proportion to the pains taken in it, and not in proportion to the results produced by it. Weeks on Attorneys, § 334; 2 Rob. 385; 27 How. p. 212.
8. Where the labor of an attorney has settled many defenses urged against a claim, and has maintained the *status quo* of said claim on property, the services have been beneficial to the client, and a fair fee should be allowed, much more where the rank of the claim has been advanced by permitting it to *pro rate* with the first mortgage.
9. Prescription only begins to run for fees when the employment is ended, although there may be several judgments rendered in the cause of the employment.
10. Where an account has been rendered, the prescription of ten years alone prescribed attorney's fees. An account delivered to the agent is delivered to the principal.
11. Where the claim against a succession is under one thousand dollars, this Court has no jurisdiction on the question of "indebtedness or no indebtedness," raised in an opposition to the account.

J. O. Nixon, Jr., and *E. B. Talbot*, for the Administrator, Appellant.

The opinion of the Court was delivered by

TODD, J. This controversy grows out of the oppositions named above to the provisional account of the administrator of the Successions of Zenon and Elise Labauve, deceased.

Messrs. Barrow & Pope and Herron & Gallagher claim to be creditors of said successions for $600, for services rendered by them jointly as attorneys-at-law, and Messrs. Barrow & Pope, for the further sum of $2,832 for similar services, and Caneza for $770.80, for moneys alleged to have been paid out by him for the benefit of said successions. They ask to be recognized as creditors, respectively, for these several sums and oppose the homologation of said account, because their claims have not been placed thereon.

From a judgment allowing these claims with a slight reduction, the administrator has appealed.

The demands are opposed on the ground that they are not owing by the successions, and the prescription of three years is also pleaded against parts of the claims for the attorneys' fees. Judge Labauve died in 1870, and Mrs. Labauve in 1880.

Previous to the death of the former, he had obtained three judgments against Mrs. Eliza Woolfolk, amounting, in principal and interest, at the present time, to over $60,000.

The attorneys named were employed by Mrs. Labauve to collect these judgments. The efforts to do so, and to defeat the measures taken by the judgment debtor and others to avoid their payment, gave rise to a great deal of litigation, long protracted, and which has been several times before this Court. 24 An. 282; 26 An. 440; 30 An. 140; 31 An. 130.

The counsel caused the judgments to be revived and rendered other professional services to the successions not connected with these judgments. All the litigation mentioned and the many suits relating thereto did not result in the collection of the judgments. They remain uncollected to this day.

In relation to the services of the counsel, connected with the judgments in question, it is contended that inasmuch as they were employed to collect these judgments, which has not been accomplished, that the fees for their services are not due and demandable and will not be until the object of their employment is accomplished and the judgments collected.

On the other hand, it is urged by the opponents that they were discharged from their employment by the death of Mrs. Labauve, and such fact entitles them to demand payment at once for their past services.

It is all important, for the determination of this issue, to ascertain the precise terms on which the opponents were employed.

On this point we have to rely almost exclusively on the testimony of Mr. Barrow, one of the opponents, by whom the services charged for were mainly rendered. And in this connection, and in view of the conclusion reached by us touching the terms of the contract with Mrs. Labauve, we deem it proper to quote portions of his testimony in the record bearing most directly on the point in question:

"My first connection with the business of Mrs. Labauve and of the estate of Judge Zenon Labauve, began about June 21st, 1872, when I was associated with Herron & Gallagher, in the prosecution of suit No. 1432 of the late 5th District Court, of Mrs. E. Labauve vs. Mrs. Emily Woolfolk et al., when we were retained for the purpose of enforcing the judgments against Mrs. Emily Woolfolk, in favor of Zenon Labauve, in suits Nos. 71, 73 and 168.

"The first step taken in that matter was the injunction in suit 1462. Subsequently, after the decision in that case, Barrow & Pope were retained to continue and endeavor to collect the above judgments."

"My employment terminated at the death of Mrs. Labauve. I am now employed by the administrator of Mrs. Labauve's succession under a special agreement, and am associated in the matter with the attorneys of the estate. Nothing is realized in the shape of money from the Woolfolk litigation.

"In saying I might ask for something on account, was only acting on the custom when you are rendering services to a party, and that party has the means, and may ask for something on account, although the services are not concluded and the fees not actually due. In this case, the estate not having money, I never asked for any."

The testimony of Major Herron was also taken and it corroborates that of Mr. Barrow, as relates to the object and terms of his firm, respecting that part of the business in which he co-operated with Messrs. Barrow & Pope.

It appears from this testimony that the opponents were employed to collect the judgments designated and that there was no stipulation or understanding in regard to the amount of the fees. Under this contract they were entitled to continue their services and were bound to do so until the sole purpose of their employment was accomplished, or until its accomplishment was shown to be impossible.

The employment of the opponents, under the terms of the contract, did not, in our opinion, terminate at the death of Mrs. Labauve. It was competent for the opponents to enforce the contracts at the proper time against her succession and continue their services under it, unless discharged by the administrator.

Mr. Barrow does not say, as a matter of fact, that he was actually discharged either by Mrs. Labauve or the administrator; but his statement on this point, about his employment terminating at the death of Mrs. Labauve, was evidently a mere deduction drawn by him from that event—his legal opinion of its effect upon the contract.

As stated, we think otherwise, and his firm had the right to continue their services in furtherance of the end in view, as if Mrs. Labauve were still living, unless forbidden to do so. Nor does the fact of these gentlemen being associated with the attorney of the succession, of itself, operate to discharge them. It is fairly to be inferred from this association that their employment was continued with special reference to the collection of these judgments, since their familiarity with the business and their well earned experience rendered their services, it is to be presumed, almost indispensable.

The judgments in question remain in the same condition as at Mrs.

Labauve's death, or, as explained by Mr. Barrow, that he had only succeeded in clearing away the obstacles interposed by the opposing parties to their collection.

Under the circumstances, we do not consider that the fees for the services in question are now exigible. The death of Mrs. Labauve did not render them so.

The law on this point is correctly enunciated in this quotation from "Weeks on Attorneys-at-Law:" "That where a contract was made for the prosecution of a claim * * and the attorney rendered certain services under such contract, the death of the client did not dissolve the contract, but the compensation remained a lien upon the money when recovered." P. 598; also Wylie vs. Cox, 15 How. 415.

Nor, in the views expressed and conclusion reached, would we wish to be considered as contravening the general rule on this point, which, as we understand, is that no agreement is implied on the part of an attorney when he puts a claim in suit for his client or receives one for that purpose; that he must look to the claim only as the means of satisfying his charges, or that he must wait for his pay until it is determined whether it is collectible or not.

The facts of the instant case do not bring it within this rule, and our conclusion is based upon the evidence relating to the engagement in question, as disclosed by the record.

The charge of $100 for fee in succession of Louis Petit, on opposition, is a correct change. There is no dispute about the services being rendered, and the fee charged is a reasonable one.

As to the rest of the charges in the account, being fees in cases of Mrs. E. Labauve vs. Posey & Lyle, $1,000; Mrs. E. Labauve vs. John N. Lyle, $75; reviving judgment of Labauve vs. A. Petit et al., $100, we are compelled to sustain the plea of prescription against them.

The services charged for in the first two cases were rendered in 1873, and the judgment of revival in the case last named was rendered on the 4th May, 1878, and the opposition was filed on the 17th of June, 1881; consequently, more than three years had elapsed between the date of the services and the demand made in the opposition.

It is not shown that the account for these fees was ever acknowledged by Mrs. Labauve, or in fact was ever rendered to her. No authority was shown in her alleged agent, Caneza, to acknowledge the account, nor was it shown that the alleged imputation of payment made thereon was approved by Mrs. Labauve, and besides, more than three years had elapsed from the time of the payment to the date of the judicial demand. Moreover, it would require a higher degree of evidence than that relied on to show an interruption of prescription against a succession.

In regard to the claim of Caneza, we think it was improperly allowed; it exceeds $500 and is not supported by the required evidence. C. C. 2277.

The fact that Caneza rendered an account of his agency to Mrs. Labauve a short time before her death, embracing the periods when these payments for her, or on her account charged for, purport to have been made by the agent, and in this account showed a balance against himself which he paid to Mrs. Labauve, creates a presumption against the correctness of the claim now urged against her succession. Why should he pay over money to Mrs. Labauve on an acknowledged indebtedness, if at the same time she was owing Caneza a much larger sum? His opposition should have been dismissed.

This disposes of all the matters embraced in this appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be amended as follows: That the opposition of Barrow & Pope, and Herron & Gallagher, be dismissed as of non-suit, and the opposition of Barrow & Pope be also dismissed, as of non-suit, as relates to their claims for services rendered in cases of Zenon Labauve vs. Emily and J. B. Woolfolk, Nos. 71 and 73; Zenon Labauve vs. Emily Woolfolk, No. 168; Mrs. Elise Labauve vs. Henry R. Slack, Louisiana Woolfolk et al. vs. Emily Woolfolk, Mrs. Labauve et al., intervenors, Mrs. Elise Labauve vs. Emily Woolfolk, No. 1432, reserving to all of said opponents the right to prosecute their demands hereafter under the conditions stated in our opinion, and with the exception of the charge for services rendered in the succession of Louis Petit, on opposition of Mrs. Labauve, that the said opposition as to the residue of the demands therein asserted, be rejected; and that the opposition of Andrew Caneza be dismissed, as of non-suit, and as thus amended, the judgment is affirmed, the costs of this Court to be paid by the opponents.

Levy, J., absent.

ON APPLICATION FOR REHEARING.

The opinion of the Court was delivered by

FENNER, J. We granted a rehearing in this case, for the purpose of reconsidering our determination of the oppositions of Barrow & Pope, and Herron & Gallagher, and of Barrow & Pope, so far as relates to their claims for services in the Woolfolk litigation.

We reiterate the general rule stated in our original opinion, "that no agreement is implied on the part of an attorney, when he puts a claim in suit for his client or receives one for that purpose, that he must look to the claim only as the means of satisfying his charges, or that he must wait for his pay until it is determined whether it is collectible or not."

A review of the evidence in this case raises grave doubts as to the correctness of our original conclusion, that the particular facts of this case bring it within any exception to this general rule.

The issue as to the exigibility of the fees claimed, before the final termination of the litigation, under the particular contract between Mrs. Labauve and these opponents, does not seem to have been distinctly presented in the lower court, and the testimony as to the nature of said contract is vague and ambiguous.

We deem it safer to recall the opinions expressed by us on that subject, and to make our judgment of non-suit, as to these charges, a simple one, unrestricted by any conditions resulting from said expressions of our original opinion.

We find no occasion to change our original decree in any other respect.

It is, therefore, ordered and adjudged, that our original decree herein be amended, by striking therefrom the following words: "Reserving to all of said opponents the right to prosecute their demands hereafter under the conditions stated in our opinion," and that, with this amendment, in all other respects said original decree remain undisturbed.

Manning, J., takes no part.

No. 8421.

AZEMA DOBARD, WIFE OF C. ESCANDE VS. C. V. THIBAULT, SHERIFF, ET AL.

A married woman was authorized by the judge to effect a loan of money, and to make her note therefor and secure it by a mortgage upon her separate property. The note and mortgage were executed, the husband appearing before the notary with his wife and joining in the Act and authorizing her. Executory process having been sued out thereon, *held*, that no other authorization, either by the judge or the husband, was needed to empower her to resist that process by injunction.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor*, J.

J. A. Seghers, for Plaintiff and Appellant.

E. H. McCaleb, for Defendant and Appellee.

The opinion of the Court was delivered by

MANNING, J. On January 26, 1875, Azema Escande, a married woman, was authorized by the judge to effect a loan of money, and to secure its payment by a mortgage upon her separate property. Under this authorization she and her husband appeared before a notary, and with his authorization she made her note for $1,891.16 drawing eight per

cent. interest, and executed a mortgage upon a tract of land in Plaquemine parish to secure its payment. D. R. Carroll became the holder and owner of this note by purchase for value before its maturity.

In June, 1878, more than two years after the note matured, Carroll obtained executory process upon the note and mortgage which was injoined by Mrs. Escande upon the grounds that Carroll was merely a nominal party; and the note was made at her husband's request and for his debt; and that she had demanded the note from Deguilhem (who was the payee) who answered that he had been paid except near $400, for which sum she gave him her due bill; and that the note was in Deguilhem's possession until his death in 1877 when it was abstracted and put on the market.

On the trial these averments were not supported by proof and the injunction was dissolved with $50 damages as attorney's fee. Her appeal to this Court was dismissed. Opinion Book 51, p. 173.

Mrs. Escande then obtained another injunction, averring that she had never been authorized, either by the judge or her husband, to stand in judgment in the executory proceedings. A rule was taken to dissolve this injunction and was made absolute by the judge in chambers out of the parish. On appeal, this Court held there was error in thus trying and determining the rule, and remanded the cause. Escande vs. Thibault, 32 Ann. 281. The case was again tried below, and final judgment was entered dissolving the injunction with reservation of Carroll's right to sue hereafter for damages. The plaintiff having appealed from that judgment, the case is before this Court the third time.

The plaintiff was authorized by the judge to make the note and mortgage. She was authorized by her husband also at the moment of their execution, and was assisted by him in that act. No further authorization is needed to empower her to resist executory process for the foreclosure of the mortgage thus executed. Stewart vs. Boyle, 23 Ann. 83.

If it was needed, the order of the judge, obtained by her, granting the injunction, is of itself an authorization, for be it observed these authorizations are the emptiest of formalities. By a fiction, as bald as to the practitioner it is baseless, the husband is supposed to have graciously given his marital permission to his spouse for the performance of an act she is legally powerless to do without it, while in fact the expression of that permission is but a piece of professional mechanism. It may well be doubted whether refinements of construction, which are based upon the turn of a sentence, have not already proceeded too far.

The chief reliance of the plaintiff's counsel upon authority is Delacroix vs. Hart, 23 Ann. 192, wherein, he says, "this Court after a careful

examination" held in accordance with his views. In that case Delacroix, having issued a *fi. fa.* upon a judgment against Hart, and having propounded interrogatories to Mrs. Barrow, a married woman, which were not answered but were taken *pro confessis*, held, that authority to the wife to stand in judgment was totally wanting. Its applicability to the present case is not apparent.

The pretexts upon which this litigation was commenced, and the failure to make good any one of the sworn allegations of the plaintiff's first injunction; the persistence in obstructing her creditor's legal process, and her resort to a second injunction upon frivolous grounds, will be considered by the tribunal that hears the suit for damages upon the bond, right to bring which is reserved by the judgment of the lower court which we shall affirm. The defendant Carroll has prayed for ten per cent. damages for a frivolous appeal, and we grant it. Therefore,

It is ordered, adjudged, and decreed that the judgment of the lower court is affirmed, and further that the defendant D. R. Carroll have and recover of the plaintiff Azema Escande ten per centum upon the amount involved in this suit as damages for a frivolous appeal, and his costs in both Courts.

Rehearing refused.

No. 8588.

THE STATE OF LOUISIANA VS. VICTOR ELOI.

Where a juror is challenged by the accused as incompetent on account of a defective memory, and the judge after examining the juror decides that he is competent, such ruling being on a matter strictly within his discretion will not be disturbed on appeal, unless the error is palpable. Judgment affirmed.

APPEAL from the Criminal District Court for the Parish of Orleans. *Roman*, J.

J. C. Egan, Attorney General, for the State, Appellee:

1. This Court will not review the opinion of the Judge *a quo* in determining whether a juror is competent or not because his memory is defective; this is a matter resting entirely in the discretion of the lower court.
2. It is a fixed and deliberate opinion as to the guilt or innocence of the accused which disqualifies a juror; but not such an opinion as will readily yield to evidence. 32 An. 1098 and 1241; 33 An. 890; 34 An. 191; 14 An. 462 and 673; 23 An. 148; 29 An. 642; 27 An. 692; 6 An. 653; 4 An. 505; 11 An. 607; 3 R. 535; Burr Trial, Vol. 1, p. 416.

L. Marrero, for Defendant and Appellant:

1. Jurors being the sole and exclusive judges of the law and the evidence must have sufficient memory to remember the testimony, in order to arrive at a just, intelligent and legal verdict. Wat. & Grah. on New Trials, Vol. I., p. 62; Vol. II., pp. 272, 273, 286; 1 Ala. Rep. 302.

2. Persons totally or partially deprived of memory or understanding, are incompetent to serve as jurors, or witnesses. Arch. Pl. and Prac. 468; Hartford vs. Palmer, 16 John Rep., 143.
3. Persons to be jurors must be competent and intelligent and in the full possession of their mental faculties. Dunlop's Laws of Penn., pp. 612, 622, Sec. 85; La. Acts 1880, 54, p. 52; Hogshead vs. State, 6 Hump. Rep. 59; Baxter vs. People, 3 Graham's Rep. 368; See Statutes of La., N. Y., N. J., Mass., Maine, Ohio, Mich., and Codes of Iowa, Virginia, etc.
4. Jurors are forbidden to take with them books, papers, documents or notes, when they retire to deliberate on their verdict; they must rely on their memories. 1 Chit. Arch., 230; Gra. Prac. 272, 274; 2 Hale's P. C. 306, *et seq.*; Wat. & Grah. 67; The King vs. Sutton, 4 Maule & Sel. 532.

The opinion of the Court was delivered by

TODD, J. The defendant was indicted for murder, was tried and convicted, the jury returning an unqualified verdict of guilty, and from a sentence of death has appealed.

There was no motion for a new trial or in arrest of judgment filed in the court below. We find in the record, however, three bills of exceptions to several rulings of the Judge.

The first bill was taken to a ruling as to the competency of a juror who, in answer to a question asked him on his *voir dire*, said he had a bad memory, and was challenged for this cause. The challenge was overruled.

It appears from the bill, that after the statement made by the juror touching his defective memory, he was further interrogated by the Judge and, after such examination, the Judge came to the conclusion that the memory of the juror was sufficiently good to render him competent. This was a matter of fact which was peculiarly within the province of the Judge to decide and strictly within his discretion. The juror was before him and opportunity was afforded to test his capacity in the respect mentioned and judge of his competency. And whilst we fully concede the force of the authorities cited by the counsel, prescribing the qualifications for jurors, among which are sound mind and memory, yet, under our settled jurisprudence, this Court will not interfere with a ruling of a Judge of the first instance on a question of this kind, unless that ruling is manifestly erroneous, which we do not find to be the case in this instance.

The other bills of exception in the record are waived in the argument of counsel and, therefore, need not be considered. We find no reason to disturb the sentence appealed from and it is, therefore, affirmed, with costs.

No. 8715.

THE STATE OF LOUISIANA EX REL. CREMONINI VS. THE MAYOR OF BATON ROUGE.

A *mandamus* lies to compel a municipal officer, clothed with judicial powers, to grant an appeal from a judgment imposing a fine under the provisions of a municipal ordinance charged with unconstitutionality.

The defense, that the party fined and imprisoned for non-payment of the fine, was released on *habeas corpus* by the District Judge, owing to the unconstitutionality of the ordinance, is no reason why the appeal should not be granted to the party by the magistrate.

APPLICATION for a Mandamus.

Cross & Jones, for the Relator.

C. C. Bird, City Attorney, for the Respondent.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the defendant, who is clothed with certain judicial powers, to grant a suspensive appeal from a judgment rendered by him, inflicting a fine, under the provisions of a municipal ordinance charged with unconstitutionality.

The answer of the defendant is, that no appeal should be granted, for the reason that the Relator who had been imprisoned for non-payment of the fine imposed, was released on *habeas corpus* by the local District Judge, on the ground that the ordinance is indeed unconstitutional.

The defendant does not, by such answer, justify his conduct. It is a *non sequitur* to say that because the District Judge has, in the proceeding stated, declared the ordinance to be unconstitutional, the Relator is not entitled to have the judgment rendered by the defendant reviewed on appeal by this Court.

A fine having been inflicted under the provisions of a municipal ordinance, the constitutionality of which is assailed, the Relator is clearly entitled to the relief sought. Const. 1879, Art. 81.

It is, therefore, ordered and decreed, that the alternative *mandamus* issued be made peremptory and, accordingly, that the defendant do grant the Relator the suspensive appeal asked, on his complying with legal requirements.

No. 8675.

THE STATE OF LOUISIANA VS. JOHN WILLIAMS.

As soon as the affidavit or charge against an accused and other proceedings had in the case before the committing magistrate are forwarded to the proper criminal court, the prosecution must be construed as having been instituted in the latter court.

At that phase of the prosecution, the cause may be legally apportioned between the Judges of the Criminal District Court, Parish of Orleans; and such an apportionment is a compliance with the requirements of Art. 130 of the Constitution, providing that all *prosecutions instituted* in said Court, shall be apportioned by lot between the Judges. A complaint by the accused, that his case was not properly apportioned, because it was allotted before indictment or information, will not be heard. Judgment affirmed

APPEAL from the Criminal District Court for the Parish of Orleans. *Roman*, J.

J. C. Egan, Attorney General, for the State, Appellee:

1. It is in the discretion of the Criminal District Court of the Parish of Orleans to adopt such method of allotting cases as may be decided upon by it.
2. Allotting the cases on the affidavits filed is an allotment of cases as provided for in Article 130 of the Constitution.

Chas. T. Beauregard, for Defendant and Appellant:

Art. 5 of the State Constitution provides that prosecution shall be by indictment or information; and Art. 130, that all prosecutions instituted in the Criminal District Court shall be apportioned between the Judges thereof by lot. 34 An. 1, 349.

The opinion of the Court was delivered by

POCHÉ, J. Defendant appeals from a conviction of the crimes of entering, etc., and of petty larceny, and from a sentence to hard labor of one year for each offense.

He complains that his case was not apportioned by lot, as required by Art. 130 of the Constitution, to Section "A" of the Criminal District Court, where he was tried, because the case was allotted previous to the filing of the information.

The record shows that the cause was apportioned under the rules of the court, while the prosecution was pending under the affidavit and other proceedings which had been sent up from the committing magistrate.

Counsel for the accused contends that under the provisions of Art. 130, such an allotment is defective and cannot confer jurisdiction to the Court which tried the case, and he argues that there is no prosecution before the court until presentment by indictment or information.

The following is the language of the Article on the subject: "All prosecutions instituted in said court shall be equally apportioned between said Judges by lot. Each Judge, or his successor, shall have exclusive control over every cause falling to him, from its inception to final determination in said court."

Counsel argues that the meaning attached to the word "prosecution" in the Constitution, is indicated by Art. 5, which provides that "prosecutions shall be by indictment or information," etc., and hence he concludes that before indictment or information, there can be no prosecution instituted for the purpose of being apportioned."

We think that this is too narrow a definition of the word "prosecution," which is defined to be "the means adopted to bring a supposed offender to justice and punishment by due course of law." Bouvier, p. 396.

Under our system of criminal law, a prosecution has several phases or steps of proceeding: the first being usually an affidavit or charge; next a warrant of arrest, and so on through the hands of the committing magistrate, whose committal transfers the prosecution to the proper criminal court, where it undergoes the other phases of presentment, arraignment, trial and conviction or acquittal.

Hence, the meaning of Art. 5 of the Constitution, in referring to "prosecutions," imports a provision for the phase or form of presentment; and in speaking of all prosecutions instituted "in Art. 130," the Constitution means all criminal *cases* which may be brought before the court.

The sentence providing that "each Judge * * * shall have exclusive control over *every cause* falling to him," etc., leaves no possible doubt on that point.

The inception of the prosecution before the criminal court dates from the day that the affidavit and other proceedings coming from the committing magistrate are filed or returned into the criminal court. If there is no "prosecution" in the legal sense of the term, or within the meaning of the Constitution, before presentment in open court, what then would have become of the charge made and other proceedings had before the committing magistrate?

From the moment that he has committed the accused to await his trial, or ordered and accepted his appearance bond and forwarded the papers to the trial criminal court, he is divested of all authority or jurisdiction over the case, and yet the cause exists as an entity, and must be pending somewhere and under the jurisdiction of some tribunal, and that tribunal must be the court to which the matter has been transferred.

If the proceedings had before the committing magistrate are not a "*prosecution*" in the legal sense, where would be the authority for detaining the accused in legal custody, or what would be the legal value of the bond furnished by the accused for his appearance before the Criminal Court? It is elementary, in our jurisprudence, that such proceedings are the basis and primary inception of the prosecution,

and that the order of the committing magistrate, accepting the bond of the accused, is a judicial act which is the basis of the judgment of the criminal court in case of a forfeiture of the bond.

Hence, it has been frequently held by our courts, that in default of such order, a bond of the accused accepted by the sheriff is null. 6 An. 700, 744; State vs. Gilbert, 10 An. 532.

From the moment that the papers in a criminal case are returned into the criminal court, the accused is under the custody of that court, whence he cannot be removed or released but by the order of that court.

Therefore, it is easy to understand that from that moment a prosecution has been *instituted* before that court, and that such prosecution is a criminal cause which can be apportioned between the Judges of that court, and that the rule of that court, regulating the apportionment of causes at that phase of the prosecution, is strictly within the spirit and the letter of the Constitutional provisions on that subject.

Our conclusion is that there is no force in the complaint and no error in the proceedings which have characterized the prosecution of the accused, and have resulted in his conviction.

Judgment affirmed.

CONCURRING OPINION.

MANNING, J. The sole object of the Constitutional requirement, that criminal prosecutions shall be apportioned between the judges by lot, is to prevent any selection of cases by preference. Chance must determine which judge shall try each case. When that is accomplished I think it a matter of indifference how, or at what stage of the proceedings, the lot is cast. The Constitutional provision is of that class that requires the most liberal construction in the interests of society and public order. I concur in the disposition of the case.

No. 8665.

THE STATE OF LOUISIANA VS. HAMP WINGFIELD.

The appearance bond of defendant and its forfeiture for his non-appearance are proper evidence to go to the jury, like evidence of concealment, flight, etc.

The Judge did not err in refusing to charge that the open and undisguised possession of the animal alleged to have been stolen, in the public streets and in company with others, "was incompatible with the guilt of the accused."

APPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Sherburne*, J.

J. C. Egan, Attorney General, for the State, Appellee.

Burgess & Burgess for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The court below did not err in admitting in evidence on behalf of the State, the appearance bond given by defendant and the judgment of forfeiture thereof for non-appearance. Such evidence falls in the same category with evidence of concealment, flight, etc., as a circumstance open to explanation by the defendant and to be weighed by the jury.

Nor did the court err in refusing to charge that the possession of the animal alleged to have been stolen, open and undisguised, in the day time, on the streets of Baton Rouge, "was *incompatible* with the guilt of the accused." It was a circumstance proper for the jury to consider, but evidently not incompatible with guilt.

No other errors are assigned.

Judgment affirmed.

No. 7884.

E. DE ST. ROMES VS. CITY OF NEW ORLEANS.

An actual physical ouster is not indispensably necessary to constitute an eviction.

If a final decree of a competent court establishing title in a third person is shewn, the loss of the land will be considered certain. The putting such decree in evidence by the party against whom it was rendered is a virtual dispossession, and compulsory, because the decree commands eviction, and is enforceable.

APPEAL from the Fourth District Court for the Parish of Orleans. *Houston*, J.

Chas. Louque for Plaintiff and Appellant:

An outstanding perfect title in a third person is an eviction as between vendor and vendee. 14 An. 717; 13 An. 499; 7 L. 286; 10 L. 120; 1 R. 362; 11 R. 397; Duvergier, t. 1, No. 313; Duranton, t. 16, No. 249; Troplong, No. 413; Pothier, Vente, No. 97; Marcadé, t. 6, p. 252.

The warranty of the first vendor includes the losses occasioned to the last vendee, by the eviction. C. C. 2506; C. P. 385; C. N. 1630; Duranton, Vente, t. 6, No. 296; Troplong, Vente, t. 1, fo. 557-628; Dalloz, 1827, part 1st, p. 93; Marcadé, t. 6, fo. 273, 276; Pothier, Vente, No. 147-149; Journal du Palais, 1842, vol. 2, p. 60; Dalloz, 1831, part 2d, p. 85; 1826, part 2, p. 177.

C. F. Buck, City Attorney, and *Wynne Rogers* for Defendant and Appellee:

1. An action of warranty cannot be maintained without proof of actual dispossession or eviction, or that the plaintiff holds the property under a new and different title from that derived through the defendant warrantor. 1 Rob. 262; 7 La. 291; 11 La. 320; 11 Rob. 397; 13 An. 499; 26 An. 588.

2. As long as the plaintiff is in actual possession, under a title under which he continues to acquire, by prescription, against the "evictor," no eviction has taken place.
3. A party who goes to trial, voluntarily offers his evidence and submits his cause, is not entitled to a non-suit, if he takes the chances of a judgment on the case as made out. He must be presumed to have proved every existing fact; and if this evidence does not make out his case, a final judgment must be rendered against him.
4. Taxes paid, and value of permanent improvements, constitute a claim against the "evictor," and not against the warrantor. 10 Rob. 178, Laizer vs. Generes; 12 An. 534, Stanilus vs Weber.
5. Use and possession are in lieu of interest. 13 An. 499; 6 An. 304; 3 La. 395; 16 La. 35.
6. Under Art. 2482, Code of 1826, 2505 R. C. C., any warrantor is only liable for the price he received for the property. In this particular case, even if the court should deem the law different, no other amount could be awarded, because there is no proof of any increase, etc. 5 N. S. 559; 6 An. 297, Burrows vs. Pierce; 10 An. 259; 14 An. 722, 757; 12 An. 534.

The opinion of the Court was delivered by

MANNING, J. The City of New Orleans, claiming ownership of the Blanc tract of land, had it divided into lots and sold them to various parties. These purchasers sold to others, and finally through several mesne conveyances Mrs. St. Romes acquired a number of the lots. Her title was successfully assailed by Mrs. Gaines, who obtained a decree in the U. S. Circuit Court, in a suit against Mrs. St. Romes, evicting her from the premises, which decree is certified to be final and executory. There has not been any physical dispossession or ouster, nor could there well be, as the land is vacant.

The judge below non-suited the plaintiff for want of evidence of forced or voluntary dispossession, and also for want "of evidence that she holds the property under a title which is not that transferred to her by her vendor."

The doctrine is well established that an actual ouster is not absolutely necessary in order to constitute an eviction. Landry vs. Gamet, 1 Rob. 363; Thomas vs. Clement, XI Rob. 398. The loss of the land will be considered certain if a perfect outstanding title to a third person is shewn to exist. McDonald vs. Vaughan, 14 Ann. 716.

The best evidence of dispossession that could be given by the plaintiff is the record of the suit against her transferror, in which there has been rendered a judgment in favor of a third person evicting her. The present suit is a compulsory abandonment of the land made in obedience to a judicial decree. The plaintiff is the transferree of Mrs. St. Romes.

The judgment of non-suit is error, and therefore,

It is ordered and decreed that the judgment of the lower court is reversed, and the cause is remanded thereto to be proceeded with in due course, the appellee paying costs of appeal.

No. 7878.

FRANK & CO. vs. JOHN CHAFFE & SONS.

In a suit to recover damages resulting from the illegal attachment of cotton seized as belonging to the debtor in the attachment proceeding, in which proceeding the true owner intervenes and recovers judgment, recognizing his title to the property, the party who had taken out the attachment is liable to the actual damages resulting directly from the seizure, among which may be reckoned all the necessary expenses incurred in the suit to recover the property, and also the actual loss in the price of the cotton whilst under seizure.

If, however, the cotton is sold by consent of parties by the sheriff during the pendency of the litigation and the proceeds go into his hands, and he fails to pay over the the money to the party entitled to receive it, such party cannot recover the amount from the attaching creditor as part of the damages resulting from the attachment. The loss is caused by the delinquency of the officer, and does not result immediately from the seizure.

APPEAL from the Fifth District Court for the Parish of Orleans. *Rogers*, J

W. S. Benedict and *J. P. Hornor* for Plaintiffs and Appellees.

Bayne & Denègre for Defendants and Appellants:

It is not the policy of the law to prevent or deter parties from asserting or defending their real or supposed rights through the apprehension of damages in the event of failure or defeat. Sage vs. Caiu, 14 An. 193.

A plaintiff who acts in good faith, and has reasonable grounds to believe that he has a good cause of action, is not in fault, and is not bound to repair damages caused to others by the legitimate exercise of his legal rights. Henry vs. Dufilho, 14 La. 50; Osborne vs. Moore, 12 An. 714; Coco vs. Hardee, 25 An. 230; 15 An. 421, 605, 716; 16 An. 3, 253; 8 An. 11; 7 An. 336.

When any damages are allowed it is only the direct damage from the particular act, and not any remote or consequential damage. 13 An. 564; 11 An. 695; 12 An. 702, 787; 4 An. 81; 26 An. 360.

If the party contributes to the loss by his own acts, he cannot recover damages. 30 An. 15; 1 An. 372.

An intervenor in an attachment suit cannot recover counsel fees as damages, especially when judgment is rendered against defendant. 7 An. 336.

Parties making an agreement for the sheriff to dispose of property on terms or in a mode not provided for by law, and making him the depositary of the proceeds, mutually constitute him as their agent, and cannot recover damages from each other in consequence of his failure to execute his agency and pay over the proceeds of sale. Gay vs Lejeune, 23 An. 250-360; 20 An 88; 15 An. 16; Gorham vs. Gale, 6 Cowen's Rep. 467; 6 Johnson's N. Y. Rep. 12; Vigan vs Wilcock, 8 East. Rep. 1.

In this case judgment was formally rendered in favor of the plaintiffs against the defendants, and the intervenors cannot recover any damages. If they ever had any right of recovery, under their supplemental petition and the matters therein, the same are prescribed by one year. 2 Martin (N. S.) 25; 6 Rob. 382; 9 An. 490; 20 An. 214, 323.

The opinion of the Court was delivered by

TODD, J. This is a suit for the recovery of damages alleged to have been sustained by the plaintiffs, from the wrongful seizure of their property under a writ of attachment sued out by the defendants.

There was judgment in favor of the plaintiffs for $1,015.25, from

which they have appealed. The defendants ask an amendment of the judgment rejecting the entire demand.

The facts are these:

On the 15th of February, 1877, the defendants instituted suit against one Heyner, a non-resident, and under an attachment in the case caused to be seized 115 bales of cotton as the property of Heyner, their debtor.

Fifteen bales of this cotton were subsequently released.

The plaintiffs, Frank & Co., intervened in that suit claiming the cotton.

There was judgment in the District Court in favor of Chaffe & Sons, maintaining the attachment and dismissing the intervention. On appeal this judgment was at first affirmed by this Court, but a rehearing was granted and judgment finally rendered in favor of the intervenors, Frank & Co., decreeing them the owners of the cotton.

Thereupon the present suit was instituted, in which the plaintiffs (intervenors in the former suit) claim as damages the costs and expenses attending the previous litigation, and in addition thereto, the estimated value of the cotton seized.

During the pendency of the former suit, by consent of all parties thereto, the cotton attached was sold by the sheriff, and on the termination of the suit this officer failed to pay over the funds arising from said sale, and the defendants herein—the attaching creditors—are sought to be made responsible for the amount thereof.

The Judge *a quo* allowed the plaintiffs legal interest on the amount of sales of the cotton, less the charges for freight and weighing, making ..... $ 489 25

Counsel fees 500 00

Costs of executing commissions 26 00

Total $1015 25

1. The plaintiffs' counsel contends that the 1st and 3d items in the above statement should be increased. That the interest was calculated in too small an amount, that is, upon too low an estimate of the value of the cotton.

We have reviewed the evidence on these points and find no material errors in these items. The evidence leaves them somewhat in doubt, but we are not prepared to say that the Judge's conclusions respecting them were incorrect.

2. We are, however, of opinion that the entire charge for the expenses of several trips made by one of the plaintiffs to this City, where the attachment was gotten out, should not have been rejected. The seizure of 95 bales of their cotton was, of course, a matter of considerable interest to them, sufficient to demand the presence of at least

one member of their firm, when they heard of the seizure of the cotton. It was necessary to employ counsel to institute proceedings for the recovery of their property, arrange, perhaps, for giving bond and to attend to other matters incident to the suit, which might well require their presence. The expenses of the first trip at least should have been allowed. We see no necessity for the two other trips charged for. Personal attendance at the trial was not indispensable. The expense of each trip was shown to have been eighty dollars.

3. We think $80.40 costs, for the printing of briefs in the attachment suit, shown to have been paid by plaintiffs, should have been allowed. It was a part of the actual expenses of that litigation.

4. The evidence shows that the cotton, on the 15th February, 1877, when attached, was fully worth $5,054.60. It sold for $4,682.15. We think the plaintiffs entitled to the difference, amounting to $372.55. Between its seizure and sale there was a decline in the price. This difference measures the actual loss to plaintiffs from this cause.

This sums up the actual damages sustained, according to our view of the case, from the illegal attachment.

5. The plaintiffs are not entitled to recover the proceeds of the sale of the cotton sold under the agreement referred to. If that agreement had not been made, we must presume that the cotton would have been on hand to respond to the final decree of the court, under which plaintiffs would have been entitled to receive it. For reasons best known to themselves, they consented to its sale. The proceeds went into the hands of the sheriff who failed to pay them over. The loss to the plaintiffs resulted not from the attachment but from the delinquency of the sheriff. This was the immediate or proximate cause of the loss. *Causa proxima et non remota spectatur.*

It is only the direct and immediate damage from a particular act and not the remote or consequential damage that can be allowed. 1 An. 372; 30 An. 15; 13 An. 564; 26 An. 250, 359; Barremore vs. McFeely, 32 An. 1181; Huyghe vs. Brinkman, 34 An., not reported.

For the loss resulting from this malfeasance of the sheriff, a loss to which their own consent to the sale in some measure contributed, the plaintiffs must look to that officer and his official sureties.

We are satisfied that the defendants instituted this attachment proceeding in the honest pursuit of what they deemed their legal rights. In taking this step it is shown that they acted under the advice of experienced and able counsel, and that, during the litigation two judgments were rendered in their favor, though subsequently reversed, is the best evidence of their good faith, and a complete vindication from the charge that the suit was wantonly instituted and prompted by malice.

The defendants must, however, pay the actual loss caused by the attachment, which we sum up in accordance with the foregoing statement, as follows:

Amount allowed by judgment, lower court	$1015 25
Expense of one trip to New Orleans	80 00
Costs of briefs	80 40
Loss in price or value of cotton	372 55
Total	$1548 20

On this sum legal interest should be allowed from judicial demand.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be amended by increasing the amount thereof to one thousand five hundred and forty-eight dollars and twenty cents, with legal interest thereon from the 8th February, 1878, and as thus amended it be affirmed. Defendants to pay costs of both Courts.

POCHÉ, J. I dissent from that part of the opinion and decree of the majority which holds the defendants responsible for the difference between the price which plaintiffs' cotton would have brought at the date of the attachment and the price which it actually brought.

The cotton was sold under the following agreement:

"To save further costs and expenses, it is agreed that the cotton held under seizure herein by the sheriff of the Parish of Orleans, may be sold by him for cash, after advertisement for five days in the New Orleans *Picayune*, *Democrat* and *Times*, without appraisement; and the proceeds of sale shall in every respect represent said cotton in the same manner as it is now held, and without prejudice to the rights of the several parties.

"[Signed] JOHN CHAFFE & SONS.

"HORNOR & BENEDICT,

"*Attorneys for Frank & Co. and E. Heyner.*"

Through their own voluntary act plaintiffs agreed that the proceeds of the sale made under their own order, would represent and stand in lieu of the cotton held by the sheriff, and this act, in my opinion, estops them from asking anything else, or any other amount of money than that which was realized by such sale.

If they had allowed the law to take its own course, the cotton would have remained in the hands of the sheriff until the final determination of the suit, and they might, in such case, claim as damages the difference in proceeds which is allowed by the decree.

The same effect should be given to the agreement touching this question as that given to it touching the responsibility of the defendants for the funds not accounted for by the sheriff.

I concur with the majority in all the other points disposed of in the decree.

No. 7921.

FRANCIS MASICH VS. THE CITIZENS' BANK OF LOUISIANA.

An agent is responsible to his principal for the acts of his sub-agent.

A bank, which receives in pledge as security for a loan and undertakes to collect for another party Havana lottery tickets which have won prizes, and consigns them to its own correspondent for collection, is responsible to its principal for the amount of commission which its correspondent or agent has overcharged for the collection of such values.

Under such a contract, the bank is held to a prudent administration of its principal's interest, and must see at its peril, that the commission charged by its agent does not exceed the customary rates of commission established by usage in the place where the collection is made.

APPEAL from the Fifth District Court for the Parish of Orleans. *Rogers*, J.

Thos. J. Semmes for Plaintiff and Appellee.

A. Pitot for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff claims of the Citizens' Bank $1,260, as an alleged overcharge on the commission for the collection of a large amount of Havana lottery tickets which had won prizes, on which plaintiff had borrowed sundry sums of money from the defendant, and which he had authorized and instructed the Bank to collect for him in Havana.

Alleging that the customary rate of commission on such collections in Havana is one-half of one per cent., and that in these transactions he was charged a commission of 2½ per cent., which was retained before remittance of his funds, he prays for judgment of 2 per cent. on the amount collected for him, on which the 2½ per cent. commission was charged.

The defense is that the commission charged was not received by the Bank, but was charged and retained by its correspondent in Havana, to whom the collection had been entrusted by the defendant, under its contract with plaintiff, who had not in his agreement with the Bank fixed any rate of commission or in any way restricted such charges to any specified rate.

The judgment of the lower court recognized plaintiff's claim, and the defendant has appealed.

The record shows that plaintiff, as the holder of a large amount of Havana lottery tickets which had won prizes, entered into a double contract with the Citizens' Bank, under which he obtained loans of money on pledging his tickets to the Bank, and under which he entrusted the Bank with the collection of the pledged tickets in Havana. On receiving the return of sale of the first consignment,

plaintiff and defendant were both astonished to discover that the Bank's correspondent in Havana had charged and retained a commission of 2½ per cent. on the amounts collected by him, and the Bank thereupon ceased to send any further collection to that agent, and had the balance of plaintiff's tickets collected by a house in this city on a stipulated commission of one-half of one per cent.

There is a serious conflict in the evidence on the point of the rate of commission to be charged for the collection of the tickets, in the contract between Masich and the Citizens' Bank.

Plaintiff and one of his witnesses contend that the agreement stipulated the customary commission, known to the defendant to be one-half of one per cent.; and the officers of the Bank are as positive in their denial of such an agreement, and in their assertion that they were ignorant of the accustomed rates of commission prevailing in Havana on such collections.

Recognizing the difficulty which we experience in reconciling the conflicting testimony of witnesses of the highest respectability, we shall avoid an expression of opinion as to which of the two versions should be adopted, and we shall assume for the purposes of this case, that the agreement contained no stipulation fixing or determining any rate of commission.

Under the law and jurisprudence, as well as by the force of well established usages of trade and commerce, the obligation of the Bank under its contract was to effect the collection of plaintiff's values in the most expeditious manner and under the most reasonable and most favorable terms. Under the legal obligations of its agency the Bank was undoubtedly held to a careful and prudent administration of its principal's interests and affairs. Hence results the obligation to have secured the services of a prudent and reliable sub-agent, and to have ascertained in advance the rate of his charges for collection of this particular kind or description of securities, and to have provided with certainty that his charges would not exceed the rates established as usual and customary on that market.

We are clear in our conviction that the proper and legal course for the Bank, before making any consignment of plaintiff's values to its correspondent in Havana, without advice restricting his rate of charges, was to have done what it subsequently did, after its experience with the Havana merchant, and to have ascertained, as it did subsequently, at what rate the collections could be made. It is in evidence that the New Orleans house which made the collection of the last tickets at the rate of one-half of one per cent., would have been willing, if entrusted with the collection of all of plaintiff's tickets,

amounting to $150,000 Spanish currency, of prizes, to have undertaken the collection on a commission of one-quarter of one per cent.

It is therefore very clear that, had the Bank begun its administration of this business with the same prudence and skill with which it handled the last transaction, plaintiff would have sustained no losses and this suit would never have been heard of.

Although the testimony touching the customary commission charged in Havana for the collection of such securities is somewhat conflicting, the preponderance of evidence satisfies us that the charge made in this case is unusual, unreasonable and exorbitant, and that the usual commission for the collection of lottery prizes is similar to that prevailing for the collection of sight drafts and other commercial paper, and is fixed among merchants and banking houses at one-half of one per cent.

In his testimony in this case, the very merchant who charged the commission complained of, says that in other collections of the same kind of values he had charged less than on this occasion, because the other collections were of small amounts, and because the responsibility was less.

The New Orleans house and most of collecting agencies take an entirely different view and, as a rule, decrease the rate of commission in proportion to the increased amount of collections made for the same person. As all agents are responsible for the acts of their sub-agents, we conclude that the defendant is and must be held responsible for the overcharge of commission made by its correspondent or agent in Havana, in the collection of values entrusted by plaintiff to the Bank.

The greater part of the brief presented by defendant's counsel is devoted to the proposition that in its contract with plaintiff, the Bank had made no stipulation touching the rate of commission on collections of lottery prizes in Havana, of which its officers were avowedly ignorant, and that plaintiff was understood to have taken all the risks of such charges.

This view is conceded by plaintiff and has been assumed as correct by us; but it cannot alter or modify the responsibility of the Bank in its undertaking as agent, to collect through an agent of its own selection the values which it held in pledge, and for which it was responsible to plaintiff.

Judgment affirmed.

No. 8625.

SAMUEL J. HART vs. H. L. LAZARUS, JUDGE, ETC.

In those cases where the amount of a suspensive appeal bond vests in the discretion of the judge, that discretion must be reasonable and just, not arbitrary or absolute. It must be a sound judicial discretion.

When an injunction has been dissolved without damages the rule is that the party cast is required to give a suspensive appeal bond only for costs. It is the injunction bond that is designed to cover losses, and to answer for damages.

But there are exceptional cases when the court in its discretion may, and sometimes ought, to fix a bond, when there is an appeal from such judgment of dissolution, in a larger sum than the appeal bond, and additional to the amount of the injunction bond, such larger and additional sum varying with and being determined by the circumstances of each case.

APPLICATION for Mandamus.

Nicholls & Carroll and *Chas. S. Rice* for the Relator.

E. D. White for the Respondent.

The opinion of the Court was delivered by

MANNING, J. The relator, having obtained a writ of injunction and given such bond as was required by the judge who granted the writ, and the injunction having been dissolved, prayed and was allowed an appeal from that judgment, but was required to give an appeal bond for two hundred and fifty thousand dollars, whereupon he applied to this Court for an alternative writ of mandamus and for a prohibition commanding the Judge to shew cause why he should not be ordered to fix the bond in such reasonable sum, not including damages arising from or growing out of the issuance of the injunction, as is contemplated by law.

The respondent shews for cause that the bond in such case was to be fixed by him within the limits of a sound judicial discretion, and he considered the sum prescribed by him a just and proper one. The reasons which induced him to this conclusion are, that the relator had injoined the State Treasurer from investing in United States Bonds over six hundred thousand dollars of money deposited with the Fiscal Agent, which injunction had issued on a bond of two thousand dollars. Upon the dissolution of this injunction respondent deemed it his duty to fix a bond for a suspensive appeal in such sum as would save the State from any possible contingent loss.

The relator avers that he is deprived of his legal and constitutional right of appeal by the requirement of a bond which he alleges is unreasonable and excessive.

There are four classes of appeals:—1, where there is judgment for a

sum of money; 2, where it is for the delivery of a specific thing; 3, for the delivery of real estate, on all which, rules are given for ascertaining the amount of the appeal bond. Code Prac., Arts. 575–7. The 4th comprises a large class of cases in which the amount of the bond rests entirely in the sound and reasonable discretion of the court. Ibid. Art. 574. That discretion must be reasonable and just, not absolute nor abitrary. It must be a sound judicial discretion.

We do not think the bond fixed in this case conforms to this requirement.

A plaintiff in injunction must give bond when the writ is granted in a sum to be fixed by the judge, who must then determine, from the circumstances as disclosed in the petition, what sum will reasonably cover the damages that may be caused by the issuance of the writ, and should prescribe the amount of the bond accordingly. The fact that his discretion is for the moment uncontrolled should make him especially vigilant over himself in estimating the possible damages. Of course men's judgments will differ. What appears reasonable and sufficient to one is not so to another, and the present case illustrates the divergence in that respect. The judge who granted this injunction on a bond for two thousand dollars erred in one way, and the judge who fixed the amount of this appeal bond erred in the opposite way.

But when the injunction thus granted is dissolved without damages, the rule is that the party cast is required to give bond for appeal only for costs. Malain vs. Judge, 29 Ann. 794; State *ex rel.* Durand vs. Judge, 30 Ann. 285; State *ex rel.* Williamson vs. Judge, Ibid. 315; Bauer vs. Lochte, Ibid. 685; Stafford vs. Renshaw, 33 Ann. 444.

The injunction bond is the one which protects the party injoined from loss, and the signers thereof are responsible for the damages occasioned by the injunction. That was the object of that bond, and its sole condition. Cres. City Slaughter Ho. Comp. vs. Larrieux, 30 Ann. 741. It has been said with emphasis, when the judge granted the injunction he fixed the bond to cover the damages that might result therefrom. He had no authority to require other conditions than those prescribed by law in order that the relator might enjoy the constitutional right of appeal. There is no reason for a bond for damages other than the one given when the injunction was issued. State *ex rel.* Roudanez vs. Lynch, 28 Ann. 517.

There have been exceptional cases however in which this Court felt justified in requiring a bond for a larger sum than the costs, and additional to the injunction bond. Instances are to be found in State vs. Judge, 19 La. 171–3; State *ex rel.* Coons vs. Judge, 27 Ann. 334, which may be consulted to ascertain the particulars of each case. The

relator in this case claims to own bonds of this State for $75,000, and his injunction was to prevent the conversion of the moneys in the State Treasury into U. S. Bonds to such extent as would imperill his interests, alleging that an investment in U. S. Bonds would be at a great premium, and their value hereafter would depend upon the uncertain fluctuations of business, and the freedom of the U. S. Government from foreign or domestic troubles. The fluctuation in value of those Bonds, to the amount he holds of State Bonds, can scarcely be more than ten thousand dollars.

We think the relator is entitled to have his appeal bond fixed in a sum which will reasonably cover the costs, but following the precedents of the two cases above cited, and recognizing this case as exceptional, we think it our duty to require that the relator shall file, besides his appeal bond, his bond with surety for ten thousand dollars conditioned to pay all such damages as shall have been sustained by the injunction heretofore obtained in case it should be decided that such injunction was wrongfully obtained, and illegally kept in force. Therefore,

It is ordered and decreed that the mandamus be made peremptory, and the prohibition perpetuated, whereby the respondent is ordered to fix the amount of the appeal bond in such sum as will reasonably cover the costs whenever the relator shall file his other bond as above prescribed conditioned as set forth herein, and that respondent pay the costs hereof.

ON REHEARING.

The prayer of the plaintiff's petition for injunction was to restrain the conversion of moneys in the State Treasury, amounting to $650,000, into U. S. Bonds, although his own interest in State Bonds is not more than $75,000. The injunction was granted as prayed. We therefore deem it prudent and proper to increase the bond to a sum which will save the State harmless from the consequences of an injunction of larger scope than was needful for the protection of the interests of the relator. Therefore,

It is ordered that our former decree is amended by increasing the amount of the additional bond to be given by the relator to twenty-five thousand dollars, and as thus amended that it be and remain the judgment of the Court.

No. 8585.

THE STATE OF LOUISIANA VS. ED. CURTIS.

The complaint of an accused that an erroneous charge was given to the jury will not be heard or entertained on appeal, if the record does not show that the charge complained of had been given in writing, or that a bill of exceptions had been taken from the charge at the time of delivery. Judgment affirmed.

APPEAL from the Criminal District Court for the Parish of Orleans. *Roman*, J.

J. C. Egan, Attorney General, for the State, Appellee.

Wm. R. Whitaker for Defendant and Appellant:

1. Where error of law in the charge appears on the face of the record, it is properly before the court. State vs. Ricks 32 An. 1098; Falk vs. People, 42 Ill. 332; Wharton's Prac. § 449.
2. The court will review the whole record on appeal, and when there is no bill of exceptions. State vs. Forrest, 23 An. 433; State vs. O'Conner, 13 An. 486; State vs. Henderson, Ib. 489; Rankin vs. Holloway, 3 Smedes & Marsh., 614; Murdock vs. Hurdon, H. & M. Va. 200; Bish. Cr. Pro., §§ 1368, 1372; Stephens on Pleading, 120, 146; State vs. Gunter, 30 An. 538.
3. Instructions "that when *alibi* is set up by the prisoner as a defense, the burden is upon him to prove it, beyond a reasonable doubt." are erroneous. It is sufficient for the prisoner, when *alibi* is a defense, to produce evidence which raises a reasonable doubt. Chappel vs State, 7 Coldw. Tenn. 92; Snell vs. State, 50 Ind. 516; Adams vs. State, 42 Ib. 573; West vs. State, 48 Ib. 483; French vs. State, 12 Ib. 670; Miller vs. People, 39 Ill. 457; Binns vs State, 46 Ind. 311; State vs. Josey, 64 N. C. 56; Toler vs. State, 16 Ohio State 583; Fife vs. Commonwealth, 5 Casey, Pa. 429; Bishop Crim. Pro. § 1066; Pollard vs. State, 53 Miss. 410; Gibbs vs. State, 1 Tex. Ap. 12; Otmer vs. People, 76 Ill. 149; Howard vs. State, 50 Ind. 190, 193; Commonwealth vs. Choate, 105 Mass. 451.
4. An erroneous instruction cannot be corrected by another which states the law accurately, unless the erroneous one be thereby plainly withdrawn from the jury. (Bradley vs. State, 31 Ind. 472; Kingen vs. State, 45 Ib. 519.)
5. If error were committed in the court *a qua*, which could by any possibility produce injury to the defendant, it is ground of reversal.

The opinion of the Court was delivered by

POCHÉ, J. The defendant seeks relief from a conviction of the crime of robbery and from a sentence of fourteen years to hard labor, on the ground of an error in the charge of the Judge to the jury.

In a motion for a new trial the accused complained of the error of the District Judge in charging the jury "that when *alibi* is set up by the prisoner as a defense, the burden is upon him to prove it beyond reasonable doubt." "If, after considering all of the evidence, the jury entertains a reasonable doubt as to the guilt of the prisoner, he must be acquitted."

In a bill of exceptions taken to the refusal of a new trial, the District Judge makes the following statement: "No exception was taken and no objection raised by counsel for the defense when the charge of the

court was given to the jury." "That charge was a verbal one and counsel for the defense assumes more than he has a right to do, when he quotes from it with such minute precision." * * * "The court instructed the jury that the credibility of all the witnesses heard in the case was before them." "That they could believe or disbelieve this or that witness as they saw fit, if after due examination of the whole evidence adduced they thought they were justified in doing so."

From the foregoing statement it clearly appears:

1. That the charge complained of is not brought up in a bill of exceptions taken at the time that the charge was given.

2. That the charge was not given in writing.

And we may add that from the record it appears that the charge complained of was not given at all.

If we concede to counsel for the accused the principle which he contends for, that "where error of law in the charge appears on the face of the record, it is properly before the court," it is clear that the error complained of does not appear in the record, in any of the modes prescribed by law and recognized by jurisprudence.

In the case of Ricks, 32 An. 1098, which he quotes, it appeared that the obnoxious charge had been given to the jury "*in writing*, and was embodied in the record," which is not the case here. That decision has been subsequently reviewed by us and has been considerably modified in the case of Baird et al., 34 An. 106, where we showed the danger of abuse in allowing the accused to complain on appeal of a charge, even in writing, to which he had not objected or excepted when it was given, by which course he "would be at liberty to take his chances of acquittal on the charge as delivered, and if convicted, to urge his objections in subsequent proceedings." And without absolutely overruling the previous opinion we laid down the following rule: "Only in cases of gross and unambiguous error will we sustain objections to the charge not made and presented by bill of exceptions at time of delivery."

The rule is sufficiently favorable to the accused, and will be adhered to.

In this case the accused has to encounter two insurmountable obstacles: 1st, the charge was not reduced to writing; and 2d, no objection was made, or exception taken, to the charge at the time of delivery. The circumstances of this case, in which the defendant complains of a charge which the Judge denies having given, and which therefore does not appear of record, justify the wisdom of the rule which requires in all but exceptional cases, that the objection to a charge must be presented by bill of exceptions taken at the time of delivery.

The record shows no error to the prejudice of the defendant.

Judgment affirmed.

No. 8637.

THE STATE OF LOUISIANA EX REL. ZUBERBIER & BEHAN VS. J. L. COLE, JUDGE OF THE TWENTY-THIRD DISTRICT COURT FOR THE PARISH OF IBERVILLE.

Where suit is brought on a claim for less than a thousand dollars, coupled with a revocatory action to annul a fraudulent sale made by the debtor, so far as it affects the creditor, the purchaser at such sale cannot appeal to this Court from a judgment annulling the sale to the extent asked for, though the property may be worth more than $1000. Mandamus refused.

APPLICATION for a Mandamus.

Alex. Hébert for the Relators.

Respondent *in pro. per.*

The opinion of the Court was delivered by

TODD, J. This is an application for a mandamus under the following state of facts:

On the 2d of May, 1882, Fenelon Robin, in his own right and as agent and partner of his mother, Mrs. Julie Robin, sold and delivered to the Relators the contents of a store, consisting of a stock of dry goods, groceries, etc., for sixteen hundred dollars.

On the 6th of the same month and year, D. G. Tutt & Co. of St. Louis, creditors of Mrs. Julie Robin & Son., the vendors of the stock of goods, instituted suit for $183.50 against them, coupled with a revocatory action to have the sale in question declared null, so far as it affected them, as having been made in fraud of creditors.

On the 30th of September following, judgment was rendered in favor of these creditors for their debt, and annulling the sale so far as it affects the interest of said creditors and ordering the sale of so much of the property as would suffice to pay their judgment.

The Relators being parties to that suit, applied for a suspensive appeal from that judgment, which was refused by the Judge who is the respondent herein.

This case comes clearly within the scope of that of Loeb & Bloom vs. Arent, 33 An. 1086. That was also a suit against an alleged fraudulent debtor for $234, joined with a revocatory action. In that case it was said: "Plaintiffs do not seek absolutely to annul the transfers complained of, but to avoid its effects as to themselves. In other words, to subject to their judgment of $234 the property of their debtor alleged to have been fraudulently transferred."

"It is therefore clear that the only issue between plaintiff and appellants is the right of the former to enforce the execution of their judgment against property held by appellants and acquired by them from Arent." See also, 34 An. 595.

For these reasons the alternative writ heretofore granted is set aside, and the mandamus is refused at the cost of the Relators.

No. 8646.

J. A. BAJOURIN vs. D. S. RAMELLI.

An order by the Judge of one division of the Civil District Court for the Parish of Orleans, transferring a cause to another division to be there cumulated with the insolvency proceedings of the defendant, is a compliance with Sec. 1816 of the Revised Statutes, which we hold not to be inconsistent with Art. 130 of the present Constitution.

Such an order is not appealable.

APPEAL from the Civil District Court for the Parish of Orleans. *Houston*, J.

ON MOTION TO DISMISS.

B. R. Forman for the Appellee.

A. Goldthwaite and *Chas. S. Rice* for the Appellant.

The opinion of the Court was delivered by

FENNER, J. The judgment appealed from is in the following words: "It is ordered, etc., that all the proceedings herein be transferred to Division "E" of this court, there to be cumulated with the insolvency proceedings of Daniel S. Ramelli." It has been the settled jurisprudence of this Court, from a very ancient date, that no appeal lies from such an order. Kelly vs. Breedlove, 9 Mart. 492; Pooley vs. Moorhouse, 13 An. 300; Powell vs. Kellar, 1 An. 25; 3 Mart., O. S., 185; 3 Mart., N. S., 25.

We presume the Judge acted under Section 1816, R. S., which provides that "suits brought anterior to the failure shall be transferred to the court in which the insolvent debtor shall have presented his schedule." We do not think this statute inconsistent with Art. 130 of the present Constitution. The case is thus identical with Pooley vs. Moorhouse, 13 An. 300.

It is, therefore, ordered, that the appeal herein be dismissed at cost of appellant.

Rehearing refused.

No. 7877.

JAMES H. BREEN VS. ANDREW DOWNEY.

In a cause which requires the investigation of long and intricate accounts, in which the lower court did not appoint auditors, the Supreme Court will remand the case for the purpose of submitting the investigation of its accounts to auditors, under Art. 443, C. P.

Judgment reversed and cause remanded.

APPEAL from the Fourth District Court for the Parish of Orleans. *Houston*, J.

B. R. Forman for Plaintiff and Appellee.

J. H. Ferguson for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff brought this suit for judgment on a balance of $2,504.18, alleged to be due to him by defendant on an account of $5,958.94, covering a period of seven years' duration.

After pleading the general denial, the defendant filed the plea of payment of $1,500 over and above the credits allowed him by plaintiff, and re-pleaded a general denial as to the balance.

The judgment of the District Court was in favor of plaintiff for $1,094.96. Defendant appeals and plaintiff moves for an amendment of the judgment, with a view to recover the whole amount of his claim.

A correct solution of the problem offered by the pleadings and the evidence in the record would necessitate a minute examination, a thorough consideration and a skilful comparison of long and intricate accounts, receipts and vouchers, amounting together to sixty-eight documents.

In the language of our predecessors, in the case of Spraggins vs. White's Executors, 4 N. S. 298, "It is a matter of surprise to us that in cases like this, where the law authorized courts to aid their investigation by placing accounts before referees, the Judges of the first instance neglect or refuse to profit by their assistance. We think it would greatly promote the ends of justice to send all such cases before men accustomed to the examination and settlement of accounts; it is almost impossible Judges can examine them with the same accuracy or arrive at as exact results."

The examination which we have made of this record has convinced us that the provisions of Article 443 of the Code of Practice were intended to meet precisely such cases as this.

In his oral argument before us, plaintiff's astute counsel admitted his inability, even after days of tedious examination, of "the inter-

minable list of papers produced by the defendant," to ascertain the precise drift of his defense.

In justice to other litigants whose cases are awaiting our action, we are compelled to refrain from such an improbable and useless undertaking, and we shall remand this cause for the purpose of submitting its long and intricate accounts to the examination of auditors. Bird vs. Black, 5 An. 192; McConnell vs. Pasley, 31 An. 532.

It is, therefore, ordered, that the judgment appealed from be reversed and set aside, and that this cause be remanded to the Civil District Court of the Parish of Orleans, now vested with jurisdiction in the premises, to be proceeded with according to law, with instructions to submit the examination of the accounts involved in said case to auditors to be appointed according to law.

Costs to abide the final determination of the controversy.

Rehearing refused.

No. 6799.

ADOLPH SICKMAN vs. CHARLES A. DIAMOND ET AL.

When one of the appellants dies pending the appeal, and appellee, suggesting his death, moves that the administrator of his succession be made a party, but offers no proof of the appointment of such administrator, and no appearance is made by him, the Court can render no valid judgment in the cause and the case will be reinstated on the docket.

This case is taken from advisement and reinstated on the trial docket.

The jurisdiction of an action of partition by one co-owner against another co-owner and against the succession of a third co-owner belongs to a court of ordinary jurisdiction and not to a probate court.

The Supreme Court can receive or consider no new evidence.

A court cannot grant a relief not prayed for in the pleadings.

APPEAL from the Second District Court for the Parish of Orleans. *Tissot*, J.

Hornor & Benedict for Plaintiff and Appellee.

St. M. Bérault and *Jas. H. Grover* for Defendants and Appellants.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by MARR, J.

On the Merits, by POCHÉ, J.

No. 8677.

The State of Louisiana vs. John Jordan.

The testimony taken on preliminary examination of a witness who is a non-resident, only accidentally present in the state at the time, and who has never since been here, will be competent evidence at the trial of the accused, where the latter was confronted with the witness at the preliminary examination and was afforded the opportunity of cross-examining him.

In an indictment for obtaining goods under false pretenses, where amongst the pretenses it is charged that the accused represented that "he wanted to buy goods on credit, in the fair and usual course of trade, etc," and that on the faith of such representations, the goods were delivered to him, this sets out such a *colloquium* as to a bargain of sale as connects the delivery of the goods therewith, and will support the indictment without more specific statement of the nature of the bargain.

APPEAL from the Criminal District Court for the Parish of Orleans. *Luzenberg*, J.

W. L. Evans for Defendant and Appellant:

The deposition of a witness taken on the preliminary examination before a magistrate, is not admissible on the trial before the jury, if the State or prosecutor can, by due diligence, bring the witness into court. The right to use such evidence grows out of the great doctrine of necessity. Wharton Cr. Ev., Sec. 229; U. S. vs. Macomb, 5 McLean, 287; State vs. Staples, 47 N. H 113; Powell vs. Waters, 17 Johns. 176; Wilbur vs. Sheldon, 6 Cow. 162; Crary vs. Sprague, 12 Wend. 41; Berney vs. Mitchell, 34 N. J. L. 337; Brogg vs. Com., 10 Grat. 722; Summons vs. State, 5 O. St. 325; Bergen vs. People, 17 Ill. 426; Kendrick vs. State, 10 Humph. 479; Dupree vs. State, 33 Ala. 380; Hobson vs. Harper, 2 Blackf. 309; Collins vs Com., 12 Bush. 271; Gerhauser vs. Ins. Co., 7 Nev. 174.

As to the doctrine of necessity. 1 Bish. Cr. Proc 3d ed. Sec. 1195; Sullivan vs. State, 6 Texas Ct. Ap. 340.

Where the charge is obtaining goods by false pretenses, the judgment should be arrested when the information fails to allege any bargain, or *colloquium* as to a bargain by which the goods were obtained. Com. vs. Strain, 10 Met. 521; State vs. Philbrick, 31 Maine 401; State vs. Bonnell, 46 Mo. 395.

J. C. Egan, Attorney General, for the State, Appellee.

I.

The opinion of the Court was delivered by

Fenner, J. The bill of exceptions to the Judge's ruling in admitting the testimony of a witness taken on a preliminary examination cannot be sustained under the circumstances disclosed therein. The witness was a non-resident of the State, who only chanced to be here at the date of the preliminary examination and had never since been in the State. The accused had been confronted with him at the examination and had the opportunity of cross-examining him. No amount of diligence on the part of the prosecution could have secured his attendance at the trial. The case falls fully under the doctrine of necessity, under which such evidence is held to be admissible. 1 Bishop Cr. Proc., Sec. 1195; Wharton Cr. Ev., Sec. 229.

We have ourselves had occasion to consider and apply this doctrine in a case of State vs. Stewart, recently decided at Opelousas, and not yet reported.

II.

The charge against the accused was obtaining goods by false pretenses. It is urged, on motion in arrest of judgment, that the information was fatally defective, because it does not allege any bargain or *colloquium* as to a bargain under which the goods were obtained.

Amongst the false pretenses set out in the information is this: that the accused represented "that he then and there wanted to *buy goods* on credit, of the said firm of Flash, Preston & Co., in the fair and usual honest course of trade, with intent to pay honestly for them, etc." And this is almost immediately followed by the statement that said Flash, Preston & Co., on the faith of said pretenses, did deliver goods, etc.

We think this sets out such a *colloquium* as to a bargain of sale as connects the delivery of the goods therewith, and takes the case out of the authority of Strain's case, 10 Metcalf, 521, and the other cases founded therein, quoted by defendant's counsel, from 31st Maine, 401, and 46 Mo. 395. This case falls more properly under the authority of Com. vs. Hulbert, 12 Metcalf, 446, where the indictment, not substantially differing from the present, was sustained. See also, People vs. Skiff, 2d Parker, (N. Y.) p. 139.

Judgment affirmed.

No. 8623.

THE STATE OF LOUISIANA EX REL. G. A. BREAUX ET AL. VS. THE JUDGES OF THE COURT OF APPEALS FOR THE PARISH OF ORLEANS.

A party will not be heard to contradict and go behind the express jurisdictional allegations of his own petition, for the purpose of ousting the appeal of his adversary who, in good faith, has accepted and acted upon the same.

APPLICATION for Prohibition.

Harry H. Hall for the Relators.

Respondents *in pro. per.*

The opinion of the Court was delivered by

FENNER, J. Relator seeks, by writ of prohibition to restrain the Judges of the Court of Appeals from taking cognizance of an appeal on

the ground that the amount involved exceeded the bounds of their jurisdiction.

The suit in which the appeal was taken was a proceeding by mandamus to compel the Recorder of Mortgages to erase the inscription of mortgages resulting from the recordation of State taxes for the years 1871, 1875 and 1876. The petition sets forth specifically the amount of said inscriptions and resulting mortgages, aggregating the sum of $828.15, and contains the further distinct allegation that "said taxes, together with accrued interest and penalties, *exceed the sum of* $500, *and are less than* $1000." Judgment was rendered in favor of Relators, and the State, in appealing therefrom, guided by the allegations of Relators' own pleadings, naturally sought the Court of Appeals. Relators moved in that Court to dismiss the appeal on the ground that the amount in dispute exceeded $1000; and, that motion having been denied, they invoke at our hands the remedy of prohibition.

Authorities are quoted in support of the doctrine, always recognized by ourselves, that consent cannot give jurisdiction. But no authority can be found holding that a party may contradict and go behind his own specific jurisdictional allegations for the purpose of ousting the appeal of his adversary who has accepted and acted upon the faith thereof. Nothing in the record contradicts the allegations as to the amount of the mortgages. Legal argument is presented to show that the mortgages, as inscribed, cover not only the principal of the taxes but interest and penalties. The State contends, and the Court of Appeals held, that the inscription covered the principal only. These extremely important questions were not at issue in the case; and certainly the present is not a proper proceeding in which we should be called upon to decide them. Upon the face of Relator's own petition the Court of Appeals has jurisdiction of the cause and we will not listen to his own impeachment of their truth.

The application for prohibition is, therefore, denied.

Rehearing refused.

No. 8663.

Winkler & Ricks vs. Their Creditors.

Section 1799 of the Revised Statutes, providing that in deliberations of creditors in insolvency proceedings, "the opinion of the majority of the creditors in number and amount shall prevail; but in case of any equality, then the number of persons shall prevail," requires unequivocally a majority of creditors, both in number and amount, in order to choose a syndic, and cannot be construed away.

The term "equality" in the last phrase refers to equality *in amount*, in which case only can the majority in number elect.

Winkler & Ricks vs. Their Creditors.

In case of refusal of a majority of creditors in number and amount to agree upon a syndic, Section 1810, R. S. applies.

The same rule applies to all other questions submitted to creditors: in case of failure of a majority in number and amount to agree, the court will solve them according to the provisions of the insolvent laws or other laws in *pari materia*.

APPEAL from the Civil District Court for the Parish of Orleans, *Tissot*, J.

Braughn, Buck & Dinkelspiel for the Appellant.

Chas. S. Rice for the Appellee.

The opinion of the Court was delivered by

FENNER, J. At a meeting of the creditors of the insolvents, a vote was taken for syndic. W. O. Hart received the votes of a majority of creditors in amount, while another party received the votes of the majority in number. Hart asked to be appointed syndic, as having been legally elected, and from the judgment of the court rejecting his application he prosecutes this appeal.

The Judge rests his conclusion on the ground that Hart had not received the votes of the majority of creditors in number and amount, as required by Section 1799 of the Revised Statutes, which reads as follows:

"In all the deliberations which shall take place between the creditors, either for the choice of syndic, or for the sale or disposal of the property surrendered, or for any other object relative to the mass of the creditors, the opinion of the majority of the creditors in number and in amount shall prevail; but in case of any equality, then the number of persons shall prevail."

It must be admitted that the language of the Section is clear and unambiguous, in so far as it requires the votes of "the majority of creditors in number and amount" in order to elect a syndic, or to determine any other question which, under the law, may be submitted to the creditors.

An ingenious argument is presented to induce us to disregard the language of the Statute and to hold that the legislature meant to say that "the opinion of the majority of the creditors in amount shall prevail," and that the words, "in number and" slipped into the Statute through inadvertence and in violation of the legislative intention, and should be eliminated and disregarded.

In support of this it is urged:

1. That a literal construction would render the last phrase of the Section absurd and meaningless. That phrase is, "but in case of any equality, then the number of persons shall prevail." It requires no stress of construction to reconcile this with the previous provision, as

thus: the opinion of the majority in number and amount shall prevail, but in case of equality *in amount*, then the number of persons shall prevail. No other *equality* could be referred to, because, of course, if there was an *equality in number*, it would be absurd to say that the *majority* in number should prevail.

2. It is urged that the law prior to the adoption of the Revised Statutes had always been in accordance with the view now taken by appellant. This would rather seem to be an argument against his position; for if it had not been the legislative intention to change the law, why should they have changed the language?

3. It is claimed that the words "in number and" evidently crept in through inadvertence or clerical error. This is possible; but, on the other hand, it is to be borne in mind that at the date of the revision, the bankrupt law of the United States was in full vigor and it required a majority of creditors in numbers and amount to elect assignees. U. S. Rev. Stat., Sec. 5034.

It may well be that the legislature thought proper to assimilate our Statute to this provision. A like rule is also followed in respite proceedings under our own Code. Art. 3086.

4. It is claimed that under a literal construction, in case of an equality in *number* of votes, there can be no appointment of a syndic or determination of any other question which may be submitted to creditors, and thus the insolvent proceedings would be clogged and stopped.

This apprehension is unfounded. So far as the election of syndic is concerned, Sec. 1810, R. S., fully provides for the case of failure of creditors to elect, and is again in harmony with the U. S. Bankrupt Law, Sec. 5034. It is true Sec. 1810 provides for the case where the creditors "refuse to appoint a syndic," but when they refuse to vote in such manner as to appoint under the Statute, they may well be held "to refuse to appoint."

This Court, in construing the 29th Section of the Act of 1877, which is identical with R. S., Sec. 1810, held "that in case the meeting of creditors *fail* to elect a syndic, the court shall authorize the sheriff to perform the functions of syndic." Morris vs. Williams, 6 An. 391.

So in the matter of determining the "times, places, terms and conditions" of sale of property under R. S. 1812, it was long since held that in case of failure of creditors to fix them, they should be governed by the law regulating execution sales. Mayfield vs. Comeau, 7 N. S. 180; Rivas vs. Hemstock, 2 Rob. 187; Egerton vs. Creditors, *Id.* 201.

Nor is there any matter submitted to the determination of creditors, for the disposition of which the court cannot find ample authority in law, in case of failure of the creditors to act.

The fear that the insolvency proceedings may be stopped is entirely illusory.

We find nothing in this case which would justify such a heroic operation as the excision of vital parts from the body of the law.

The Judge in this case did not err, therefore, in rejecting the application of Hart; and, in ordering another meeting of the creditors to afford a new opportunity of election by them, he exercised a discretion with which we have no disposition to interfere.

Judgment affirmed at appellant's costs.

Poché, J., dissents, reserving the right to file his reasons.

[The following cases were, by mistake, not reported among those of May last, as they should have been.]

No. 8035.

NEW ORLEANS, SPANISH FORT & LAKE R. R. CO. vs. GEORGE DELAMORE.

The law is well settled, that the franchises and corporate rights of a Company and the means vested in it for the purpose of its existence, cannot be granted away and transferred by any act of its own, or by any adverse proceeding, unless with the consent of the original grantor, formally expressed. In the absence of any provision to that effect, either in the general law or in the charter of such Company, the franchise cannot be levied upon for debt.

The *franchise*, so termed, in this case, is nothing more than a right of way or license conferred by the Municipal Ordinance, and cannot be treated as a corporate right, which derives only from sovereign dispensation. It is, in this instance, only an incident of the corporate existence of the Company, as created by law, and determines with the extinction of such corporate life.

Hence, neither the franchise or corporate rights, nor the right of way of the Company, have passed at the bankruptcy sale.

APPEAL from the Fifth District Court for the Parish of Orleans. *Rogers*, J

Chas. S. Rice and *Breaux & Hall* for Plaintiff and Appellant.

Mott & Kelly, on same side, on Application for Rehearing.

W. S. Benedict for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff has enjoined the defendant from judicially selling a frame structure at the Spanish Fort on the Pontchartrain Lake shore, and a franchise granted by municipal ordinance, of the right of way from a central point in the urban part to said Fort and shore.

The ground of opposition to the seizure is, that the building and the right of way belong to the plaintiff and not to defendant's judgment debtor.

The defenses are: that the structure is not on plaintiff's land, was not constructed by plaintiff or any one for its account, and that the right of way, which was granted by the City of New Orleans to defendant's judgment debtor, has never passed to plaintiff and still is the property of that debtor.

There was judgment decreeing the building to belong to defendant's debtor, and the franchise to have enured to the plaintiff, and not to be liable to the seizure effected of it.

From the judgment so rendered both litigants appeal.

For a proper understanding of the merits of the case, a clear knowl-

edge of the established facts, in their chronological order, is of great value.

On the 19th of May, 1873, a corporation styled "The Canal Street, City Park and Lake Railroad Company" was created. By Ordinances 2264, 2548 and 3146, a right of way was granted it by the Municipal Council, to extend from the neutral ground on Basin street, near Canal street, in the Second District of New Orleans, through a determined route to the Lake shore at the Spanish Fort.

This Company went into bankruptcy and on the 29th of November, 1876, the property surrendered was ordered to be sold, part cash and part on credit, with vendor's lien and mortgage. The advertisement described the railroad, main track and branches, the stations, the buildings, car fixtures, stock and other effects and all the *franchises* of the Company.

On the 14th of July, 1877, at the sale, an adjudication was made to T. H. Handy, part cash and part on time, the notes to be secured by vendor's lien and special mortgage, with the clause *de non alienando*.

This sale was confirmed by the Bankrupt Court at its November term, and an act of sale was ordered to be executed by the special master, which was passed on January 26th, 1878, describing what purported to have been sold, including the franchises or right of way granted by the City.

On the 31st of January, 1878, another corporation by the same name as the defunct one was formed for like purposes.

On the 22d of May, 1878, the City Council granted to it, by Ordinance 4523, rights similar to those previously conceded to the first Company.

On the 15th of August, 1878, Handy assumed to transfer to the Company all the property which he had acquired on the 14th of July previous, on the assumption by the corporation of his debts and liabilities as adjudicatee and purchaser.

Subsequently, one of the notes thus assumed having matured and remaining unpaid, executory process issued, the property affected was seized and on the 8th of March, 1879, was adjudicated to Moses Schwartz & Bro.

On the 31st of March, 1879, another corporation, the present plaintiff, was formed for objects similar to those which the previous corporations had proposed to carry out.

On the 9th of April, 1879, Schwartz & Bro. transferred to it the property, and in terms the franchise also.

On the 25th of October, 1879, the defendant, Delamore, who had obtained judgment against the second corporation, levied his writ on the frame building already mentioned, known as the "Pavillion," and

on the right of way granted that corporation by the City by Ordinance 4523, adopted May 25th, 1878.

The questions presented are:

1. Whether the Pavillion belongs to the plaintiff.

2. Whether the franchises or right of way first granted by the City to the first Company passed to Handy; whether they next were transferred by him to the second Company; whether they, or those conferred by Ordinance 4523, afterwards passed from it under the executory proceedings to Schwartz & Bro., and whether they were finally transferred by the latter to the present plaintiff.

First. We do not think it necessary to decide presently, whether the soil on which the "Pavillion" was built forms part of the realty which the plaintiff acquired from Schwartz & Bro. The contention is not about that soil but about the building.

The evidence shows that the structure was connected with plaintiff's undisputed land and was for its exclusive use; that it had been put up for his purposes by a third party, before the plaintiff had acquired any existence, and that it was finished or completed by the second Company. We hear no complaint in this suit, either from such party or from such Company, unless it be through Delamore championing its rights. The building was in existence and such as it is attached to and in the use of the land when the writ was executed against the Company. The advertisements included the land and all its accessories. By the adjudication to Schwartz & Bro., the Pavillion passed from the Company to them and it afterwards was transferred by them to the plaintiff, who therefore owns it to the exclusion of the creditors of the Company, who had not previously expropriated it.

Second. The right of way granted by the City to the first Company was not transferred to its creditors. It did not, therefore, pass to Handy at the bankruptcy sale. It had reverted to the grantor, Handy, who had not, therefore, acquired it, did not encumber and did not transfer it to the second corporation, which consequently never owned it. 2 Kent, Ed. 1867, p. 333, *note.*

The City authorities granted the second corporation a similar right of way, which was *accepted* by it. This acceptance negatives the theory that this corporation acquired the right of way adjudicated to Handy at the sale of the assets by the special master.

This right of way granted by the City to the second Company, by Ordinance No. 4523, was never mortgaged at all by it, still less seized and sold. The plaintiff claims that the grant was a superfluity, but this is not so. As the first right of way was not surrendered, was not sold, was not transferred to the second Company, but had reverted to

the City, it was not sold to Schwartz & Bro., who did not, therefore, acquire and did not sell it to the plaintiff.

The second Company was created under the general laws of the State, and had the right to "*borrow money*" for the construction or repairs of the road. "*For that purpose*," it could issue bonds and secure them by mortgage upon the franchises and all the property belonging to it. R. S. 692, 693, 2396; Redfield II, 408.

Had it done so, and on its failure to pay had the property and franchise encumbered been sold, the purchaser would have stepped in its place and would have acquired and held both.

But the Company had no right, when it made the purchase from Handy, to secure the price of sale, as it did, on the *franchise* which was inalienable. It did not mortgage for any purpose the franchise or right of way conceded by Ordinance 4523.

It could have mortgaged the franchise and thus made it liable to seizure, sale and transfer, if the mortgage had been consented to secure the payment of money borrowed for the construction or repairs of the road. It has not done it, and what was otherwise done is of no effect.

It is settled by numerous authorities that the franchises and corporate rights of a Company and the means vested in them, which are necessary to the existence and maintenance of the object for which they were created, are incapable of being granted away and transferred by any act of the Company or by any adverse proceeding, unless with the consent of the donor or grantor formally expressed. In the absence of any provision to that effect, either in the general law or in the charter, it is settled that the franchise cannot be levied upon for debt.

The argument is unwholesome that the Statute which authorizes the mortgage of the franchise in certain cases was designed merely to make the franchise mortgageable, which otherwise, not being a real right, would not be so. The intent of the law may have been such, but the main object was to make the franchise transferrable, as without such a law it would not be so.

The franchise so termed in this case is nothing more than a right of way. The franchise proper is the right to become a corporation, and when such to exist and operate. The right of way is an incident growing out of such existence and which determines with the extinction of corporate life. It is a personal servitude, the exercise of which was confined to the grantee in default of stipulation to the contrary, and which is dissolved when the grantee ceases to exist or forfeits the right to enjoy it. R. C. C. 722, 821.

The grant or license conferred by the municipal ordinance was a

mere right of way. It does not come within the definition of a franchise, which the City could not confer and which derives only from sovereign dispensation. 73 Ill. 548; 4 Kernan, 506.

A corporation is an artificial being which the law alone can create. When created it cannot transfer its own existence into another body, nor can it enable natural persons to act in its name, as its agents. The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law by some positive provision has made it so and pointed out the modes in which such sale and transfer may be effected.

When the sovereign covenants and agrees that a certain corporation shall administer certain franchises, its ordinary judgment creditors may sell its property, but not its franchises. They are beyond the reach of an ordinary execution. It is a State prerogative to put the administration of its franchises into such hands as it may choose. Those franchises cannot be transferred to other hands without the consent of the grantor. Neither the franchise nor the right of way could be transferred. Hence, neither has passed at the bankruptcy alleged sale thereof. If neither passed to Handy, he transferred nothing to the second Company, which having acquired none, transferred none to Schwartz & Bro., who having purchased none, conveyed none to the plaintiff.

We do not understand the plaintiff as claiming any other title from Schwartz & Bro. than such as they may have acquired from the second Company, at the seizure and sale brought about by the non-payment by it of the obligations of Handy, assumed by it in the sale from Handy to it, of the franchise said to have been acquired at the marshal's sale, in the bankruptcy proceedings. The plaintiff does not claim to have acquired through its authors the right of way granted by the City to the second Company by municipal ordinance. The petition repudiates the idea that the second Company acquired the right of way otherwise than from Handy and by him in the bankruptcy proceedings of the first Company. 2d Kent, Ed. 1867, p. 333, Note; Stewart vs. Jones, 40 Mo. 140; Susquehanna Canal Co. vs. Bonham, 9 Watts & S. 27, (Pa.); Arthur vs. Commercial Bk., 9 Smed. & M. 394, (Miss. Ct. of Appeals); Randolph vs. Larned, N. J. Ct. of Errors, 17 N. J. Eq. 557; 73 Ill. 541; 28 L. An. 222; 93 U. S. 222; 12 How. 40; 10 Allen, 448; 2 Kent, 305, 307, 284; Angell & Ames on Corp., Ed. 1875, Sec. 191, pp. 163 to 165, and Notes; Redfield on Railways, 2d Ed. 1869, pp. 462, 466, 478, 491, 553, and Notes.

Whether the right of way under Ordinance 4523 has continued to exist and vests in the second Company, is a question which we will not assume to determine in the present controversy. When the question will be presented in proper form and between the proper parties,

we will determine whether the right of way was or not a franchise, was or not a license, was or not personal and intransmissible, reverted or not to the City.

All that we are called upon now to determine is, whether it was or not acquired by the plaintiff, who has in this suit asserted title to it. That question we answer in the negative. 44 N. H. 127; 8 Gray, 575; 73 Ill. 541.

We wish to be understood as not deciding whether or not that right of way exists and vests in defendant's judgment debtor.

It is, therefore, ordered and decreed that the judgment appealed from be reversed; and proceeding to render such judgment as should have been rendered, it is ordered, adjudged and decreed that the injunction herein issued be perpetuated as to the frame building known as the "Pavillion," and that in other respects it be dissolved, and that plaintiff's demand be rejected, the costs of appeal to be paid equally by the appellants.

Rehearing refused.

Mr. Justice Fenner recuses himself, having been of counsel.

LEVY, J. I concur with the Chief Justice and Mr. Justice Poché in refusing the rehearing applied for in this case.

TODD, J., dissents on rehearing and thinks the rehearing should be granted.

No. 8457.

PARISH OF LAFOURCHE VS. PARISH OF TERREBONNE.

Interpretation of Acts of the Legislature fixing the boundary lines between the Parishes of Lafourche and Terrebonne.

In case of ambiguity in the English text of an Act of the Legislature, the French text may be consulted and serve to explain the ambiguity.

APPEAL from the Nineteenth District Court, Parish of Terrebonne. *Goode*, J.

Clay Knoblock and *E. A. O'Sullivan* for Plaintiff and Appellant.

B. F. Winchester and *Suthon & Suthon* for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. This is an action to judicially ascertain and determine the boundary lines between the Parishes of Lafourche and Terrebonne, and this appeal is taken by the Parish of Lafourche, from a judgment

of the District Court allowing the doubtful or disputed territory to the Parish of Terrebonne.

A reference to the Act of the Legislature creating the Parish of Terrebonne and defining its limits, is necessary to an understanding of the issue involved in this controversy, which hinges exclusively on a proper interpretation of the Act, which was approved on the 22d of March, 1822, and from which we quote the following Section which is the source of the contention:

"That all that tract of land lying to the westward of Bayou Lafourche, bounded as follows: to the east, from the middle of the line drawn from the lower boundary of Charles Ballot's plantation, to the lower side of Lacoupe of Bayou Bœuf, thence following a line parallel with the Bayou Lafourche to within eighty arpents of Bayou Terrebonne, from thence winding round the settlement of said Bayou Terrebonne to the distance of forty arpents from Bayou Lafourche, *to be continued* until a distance of eighty arpents from the latter Bayou can be effected without encountering the limits of the lands on Bayou Terrebonne, from thence, still at a distance of eighty arpents from Bayou Lafourche, a line parallel with said Bayou to the Bayou Blue Water, following whose right bank to the sea shall terminate its eastern boundary; to the west, starting from the lower side of Lacoupe of Bayou Bœuf to the settlement on the Atchafalaya, and following the eastern shore of Atchafalaya Bay to the sea, including Marsh Island, shall form a separate parish, to be called the Parish of Terrebonne."

By Act No. 97 of 1850, the western boundary was altered so as to run as follows:

"Beginning at the point where the line between the Parishes of Lafourche Interior and Assumption intersects the north boundary of township No. 16, range No. 14 east, thence along said north boundary to the northeast corner of said township, thence east along the north boundary of township No. 16, range No. 15, six miles to the northeast corner of said township, thence north along the east boundary of township No. 15, range No. 15 east, two miles, thence east according to the section lines of the public surveys, three miles to back line of the lands of Mrs. Lemuel Tanner, at a distance of eighty arpents from the Bayou Terrebonne," and thence according to the lines described in the Act of 1822.

There is no contest about any lines on the west of Bayou Terrebonne, nor about the line running east from a point forty arpents from Bayou Lafourche, crossing Bayou Terrebonne, in the rear of the town of Thibodaux, and extending east to the end of the last property or settlement on Bayou Terrebonne at the line of Lafourche; but the con-

tention begins at that point, which we shall for convenience designate as point F.

Plaintiff contends that from said point the line should run due south, and continue to wind round the settlements on Bayou Terrebonne, on the east, as it does on the west side, until a point at eighty arpents from Bayou Lafourche can be reached, without encountering the limits of the lands on Bayou Terrebonne, etc.

Defendant, on the other hand, maintains that from the said point F, the line should continue to run east by south parallel with Bayou Lafourche, and forty arpents from said Bayou, until a distance can be reached eighty arpents from said Bayou, without encountering the limits of the lands on Bayou Terrebonne, etc.

In other words, plaintiff urges that the "winding round" the settlement of the east of Bayou Terrebonne is the subject of the verb to "be continued," and that said "winding round" the settlement of Bayou Terrebonne on the west should be the boundary line; and defendant insists that the distance of forty arpents from Bayou Lafourche being the subject of the verb "to be continued," this line, distant forty arpents from Bayou Lafourche, should be the boundary on the west of Bayou Terrebone, until it strikes Bayou Blue Water. As the language is somewhat ambiguous, the real intention of the legislator must be sought by considering the object proposed in the establishment of this portion of the boundary lines between the two Parishes. As the lines of the settlement on Bayou Terrebonne ran at right angles with the lines of the estates situated on Bayou Lafourche, the main and the evident object of the legislator, in running the lines of the new parish so near the Bayou Lafourche, and in enacting that the line from a point eighty arpents from Bayou Terrebonne and running north to a point forty arpents from the Lafourche, should "wind round" the settlement or land lines on Bayou Terrebonne, was to avoid any change in the lines of the owners of property of that settlement, or to avoid placing portions of their property in one parish and portions in another. And the same care was taken not to break up the lines of the Lafourche lands. In our opinion, the same object prevailed in the legislator's mind in establishing the lines west of Bayou Terrebonne so as not to cut up the lines of land owners in either parish and to have entire estates exclusively in one or the other of the two parishes. Hence, we conclude that what was to be continued after point F, or the intersection of the rear boundary west of the last tract on Bayou Terrebonne and the rear line of forty arpents from Bayou Lafourche, was the "winding round" the settlement of Bayou Terrebonne, until a distance of eighty arpents from Bayou Lafourche can be effected,

etc. Such line does not encounter the limits of the lands on Bayou Terrebonne, it merely follows along or "winds round" such limits.

No reasons are advanced by defendant, and none are apparent from the equities of the case, why the boundary line on the east of Bayou Terrebonne should be at a greater distance from the lines of the settlement on said Bayou, than on the west of the Bayou, where the line "winds around" the Terrebonne lands.

This construction of the doubtful words of the Act leaves entirely in Terrebonne Parish the estates situated on Bayou Terrebonne, and leaves entirely in the Parish of Lafourche the lands fronting on Bayou Lafourche, and it avoids the very difficulty of two parishes claiming taxes from the same owner for the same lands, which has given rise to this complicated litigation.

This conclusion is fortified, and in our minds absolutely justified, by the French text of the Statute, which is free of the ambiguity which characterizes the English text.

In calling to our aid the French text, we do not lose sight of the rule of our jurisprudence, which requires that when the two texts differ the English text must prevail.

But we are supported by very respectable authority in holding that "when a law, written in the language of the Constitution is doubtful, the sense in which the members of our Legislature, who at that time spoke French, understood it, may be safely called to our assistance to explain what is uncertain." 9 M. 364, Breedlove vs. Turner.

The sense which they gave to a Statute affords the highest order of contemporaneous interpretation which the case affords. The doubtful portion of the Statute in the English reads as follows in the French text: "delà en *contournant* les établissements du dit bayou Terrebonne, à quarante arpens du bayou Lafourche, *jusqu'à* ce qu'il soit possible de s'éloigner de quatre-vingts arpens de ce dernier bayou, sans toucher aux limites des terres du bayou Terrebonne."

This language clearly conveys the idea that the boundary lines should "wind round" three sides of the settlement on Bayou Terrebonne; first at the western end, secondly on the lateral line, intersecting the forty arpent line from Bayou Lafourche, and thirdly on the eastern end.

The next difficulty suggested for solution is the proper location of the Bayou Blue Water, mentioned in the Act of 1822.

Plaintiff contends that it is the first stream east of Bayou Terrebonne, taking its rise near the Lafourche at a short distance from Thibodauxville, running to the sea, nearly parallel to Bayou Terrebonne, and sometimes known as Bayou du Chêne.

Defendant on the other hand locates Bayou Blue Water east of the latter stream, running northeast near Lake Long, until it intersects and forms one stream with another bayou of the same name, flowing out of Lake Fields, and thence running to the sea parallel with Bayou Lafourche.

From extracts of the American State papers, containing confirmations by sections and townships by the general government, of lands situated on Bayou Blue Water, we are satisfied that the stream referred to in the Act of 1822 is correctly located by plaintiff. Hence, we conclude that the judgment of the lower court, which sustains the construction of defendant on the two points in controversy does not give a correct interpretation of the Act creating the Parish of Terrebonne.

It is, therefore, ordered that the judgment appealed from be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the following are the lines fixed by law as the boundary lines between the Parishes of Lafourche and Terrebonne: "Beginning at the point where the line between the Parishes of Lafourche Interior and Assumption intesects the north boundary of township No. sixteen, range No. fourteen east, thence along said north boundary to the northeast corner of said township, thence east along the north boundary of township number sixteen, range number fifteen, six miles to the northeast corner of said township, thence north along the east boundary of township number fifteen, range number fifteen east, two miles, thence east according to the section lines of the public surveys, three miles to the back lines of the lands of Mrs. Lemuel Tanner, at a distance of eighty arpents from the Bayou Terrebonne; from thence, winding round the settlement of the said Bayou Terrebonne to the distance of forty arpents from the Bayou Lafourche, said winding round said settlement to be continued east to the rear west line of said settlement, thence south, still winding round the settlement of Bayou Terrebonne, on the east of said Bayou, until a distance of eighty arpents from Bayou Lafourche can be effected without encountering the limits of the lands on Bayou Terrebonne; from thence, still at a distance of eighty arpents from Bayou Lafourche, a line parallel with said Bayou to the Bayou Blue Water, otherwise known as Bayou du Chêne, following its right bank to the sea." Costs of this appeal to be paid by defendant.

Rehearing refused.

No. 8557.

J. S. IKERD VS. MRS. B. E. POSTLEWHAITE ET AL.

This Court will not pass upon the whole judgment of the court *a qua*, when the latter only granted an appeal from a certain portion of such judgment. The nature of this cause requires that it should be remanded.

APPEAL from the Eighth District Court, Parish of East Carroll. *Delony*, J.

W. G. Wyly for Plaintiff and Appellant.

F. F. Montgomery for Mrs. Postlewhaite, Defendant and Appellee.

J. M. Kennedy and *B. R. Forman* for Frankenbush and Englesing, Defendants and Appellees.

The opinion of the Court was delivered by

TODD, J. The plaintiff enjoined the execution of an order of seizure and sale against a certain plantation mortgaged to the defendant, Mrs. Postlewhaite, by J. Burnet, J. M. Frankenbush and F. C. Englesing, members of the commercial partnership of J. Burnet & Co. The plaintiff alleged, in substance, that he bought in 1874 one-half of this plantation known as "Wayaway Plantation," from the parties above named, and subsequently bought the one-third interest of Burnet in the other half, but that his deeds were never recorded. That in 1877, the said parties, without his consent, mortgaged the entire plantation to Mrs. Postlewhaite for ten thousand dollars. That after the purchase of his interest in said plantation he became a planting partner with his co-proprietors and sole manager of the plantation, and shipped to their firm in New Orleans for sale at least 800 bales of cotton, for which no account had been rendered. That the partnership of J. Burnet & Co. was dissolved in 1878, and J. M. Frankenbush became the liquidator of the same. That in 1881, at the request of Frankenbush and to benefit him in some contemplated litigation, he executed his note for the lease of the plantation, payable to the order of said Frankenbush, liquidator, but with the distinct understanding that his rights as part owner were not to be affected thereby. That nearly the entire mortgage debt had been paid to Mrs. Postlewhaite, but that a fraudulent combination between Frankenbush and Mrs. Postlewhaite had been entered into, by which she was interposed in this proceeding by means of which Frankenbush, or some one for him, was to buy in the plantation in utter disregard of plaintiff's rights therein, under his purchases, although the mortgage debt or the greater part of it had been paid. He asked to have the parties cited and for an injunction against the sale of his interest in the plantation, and also against the negotiation

of his rent note for $3,150, and for relief generally, in accordance with his allegations, and in case of eviction he prayed for $20,000 damages against his co-proprietors.

The defendants excepted to the petition on the ground of misjoinder of parties, having separate and distinct interests, and the cumulation of different causes of action in the same suit. The exception was sustained, so far as to dismiss all that part of the suit relating to the alleged planting partnership, and which demanded an account for the cotton shipped by the plaintiff to J. Burnet & Co., and enjoined the negotiation of the rent note and asked for its cancellation.

From this judgment the plaintiff moved for an appeal, which was refused by the Judge *a quo*, except as to that part of it relating to the rent note; and from this portion of the judgment alone the appeal was granted. No step was taken by the plaintiff, by mandamus or otherwise, to enforce his right of appeal from the entire judgment. And although the whole judgment is discussed by the appellant's counsel, it is quite apparent that the only part of that judgment before us and the only part we can review is that relating to the rent note. We cannot recognize an appeal unless it is supported by an order of appeal, and here there is no order of appeal, save and except as to the one feature of the judgment referred to. The difficulty will at once be seen of having, among so many issues contained in the pleadings and so closely connected, to single out one issue and pass upon it alone, regardless of everything else presented either in the petition or the exception thereto. Any action we might take or any expression we might use relating to the one point before us on this appeal, might seem to bear upon other parts of the judgment, with which, at present, we can have nothing to do. Fully appreciating this difficulty, we have read over the entire pleadings, as it was necessary to do in order to discover the bearing and significance of this special matter upon the rights of the parties under the pleadings; and inasmuch as it is apparent, taking as true the allegations of the petition, that a serious injury might result to the plaintiff if the rent note in question was negotiated before the questions at issue between the parties are finally determined, we have concluded that it would best subserve the cause of justice if the *status quo* touching this note is preserved until all the issues in this case are properly before us on appeal, or the controversy between the parties is otherwise settled; and this can only be done by remanding the cause and reinstating the injunction *quoad hoc*. In doing this we carefully abstain from conveying any intimation in regard to the character of this note—as to whether it was real or simulated, and should or not be cancelled—and also in regard to the propriety of the ruling of the Judge *a quo* in sustaining in part the exception. All these questions,

as well as the right of injunction against the negotiation of the note in question, which we now provisionally reinstate, as relates to its merits, are reserved for future adjudication, should those matters ever come before us again.

We have come to this conclusion after a careful review of the entire pleadings, without prejudging or intending to foreshadow in the slightest degree what our ultimate conclusions may be upon any single issue in the case.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed and the case remanded, to be proceeded with according to law and the views herein expressed; and that the exception filed in the lower court, so far as it relates to the rent note executed by the plaintiff for the rent of the Wayaway Plantation for the year 1881, and to the injunction against its negotiation, be and the same is hereby overruled; defendants to pay costs of appeal.

Rehearing refused.

No. 7490.

GEORGE SHANTZ AND WIFE VS. CARL STOLL.

In a suit to evict the wife from property transferred to her by her husband, in satisfaction of her rights against him, the latter may be a witness on his own interest as warrantor.

The failure to call one's vendor in warranty will save the latter from all the costs of court, except for service of original process.

APPEAL from the Fourth District Court for the Parish of Orleans. *Houston*, J.

W. R. Richardson for Plaintiff and Appellee.

J. H. Ferguson for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. George Shantz, Carl Stoll and Henry Walters, purchased at a marshal's sale of confiscated property a certain lot of ground and improvements situated in Baton Rouge. Walters sold his share to the other two, so that Shantz and Stoll became equal joint owners. On July 22, 1871, Stoll sold to Shantz his undivided half for $800, with full warranty. Shantz transferred the property with full warranty to his wife, in satisfaction of a judgment held by her against him. After the death of Michael Prendergast, the owner of the property at the time of the confiscation proceedings, the administrator of his estate brought suit on September 21, 1876, against George Shantz and wife to recover the property and rent from July 22, 1871. Shantz

and wife defended the suit, but did not call Stoll in warranty. Judgment was rendered against them for the property and for rent at the rate of $100 *per annum* from judicial demand, viz: Sept. 21, 1876; which judgment, on appeal, was affirmed by this Court. The present action is brought to enforce the warranty of defendant, and thereupon to recover the purchase price, one-half the cost of the proceedings in eviction, including attorneys' fees, and one-half the rent recovered by the evictor. The judgment appealed from allowed the price; $150 as attorney's fees; $100 as costs; and $100 as rents.

The following are the questions presented:

1. Defendant excepted to the testimony of the husband, George Shantz. We think the judge did not err in receiving it. He was a party plaintiff and, as warrantor of his wife, had a direct interest and was, in fact, the beneficial plaintiff. For his interest he was a competent witness. C. C. 2281.

2. The evidence satisfies us that both Shantz and Stoll intended to acquire, and supposed that they had acquired under the confiscation proceeding, a fee-simple title to the property. The deed from Stoll to Shantz, and the price paid by the latter, conclusively show that this was the title intended to be conveyed and warranted. That this was a mistake of law, shared by both parties, cannot affect the obligation of the vendor under his warranty.

3. The failure to call Stoll in warranty, in absence of proof that he had any defense, cannot avail to defeat plaintiffs' rights to re-imbursement of the price, (C. C. 2518, C. P. 388) and of the rent paid under judgment to the evictor.

4. It is otherwise, however, as to the costs. It is clearly settled that the vendor, if not called in warranty and allowed the opportunity to determine whether he shall defend or not and how he shall defend, is not liable for the costs incurred beyond the service of the original process. He cannot be held responsible for the expenses of a litigation which, if he had been notified thereof, he might have avoided. Delacroix vs. Cenas, 8 N. S. 355.

The attorney's fees, in every event, were improperly allowed. Sarpy vs. New Orleans, 14 An. 311; Late vs. Armorer, Id. 826.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be reduced by the sum of two hundred and fifty dollars allowed as costs and attorney's fees, and as thus amended, the same be affirmed, plaintiffs and appellees to pay the costs of this appeal.

Rehearing refused.

No. 8280.

Succession of Marie Chedome, Wife of Jacques Cornu.

Where a testatrix leaves one-fourth of her succession to certain collaterals and next makes money legacies and special legacies of property in kind to others, leaving the remainder of her property, after satisfaction of the foregoing legacies, to her husband, the legatees of the fourth will be entitled to one-fourth of the whole assets after payment of the debts.

The legacies of money and property will be satisfied next, and the husband, as universal legatee, will take the residue.

APPEAL from the Civil District Court for the Parish of Orleans. *Monroe*, J.

F. D. Seghers for Testamentary Executor, Appellee.

Alfred Grima for Legatees, Appellants.

F. L. Richardson for absent heirs, Appellants.

The opinion of the Court was delivered by

Bermudez, C. J. The question to be determined in this matter relates to the manner and order in which the legatees of the deceased shall be satisfied.

By her will she bequeathed: *first*, one-fourth of her succession to the five children of her sister; *secondly*, she made four particular legacies, three of money and one of two pieces of real estate; *lastly*, she gave the remainder of all the property which shall belong to her at her death, *after satisfaction of the foregoing legacies*, to her husband.

By the account presented by the latter as executor, the acknowledged sum in hand amounts to $4,497.47. Out of it it is proposed first, to deduct the money legacies, $1,000, and to divide the residue by giving one-fourth to the nephews of the deceased, $1,124.36¾, and the remaining three-fourths, $3,373.10¼, to her universal legatee.

The inventory shows that the two pieces of real estate specially bequeathed and not included in the active on the account were valued, one at $800, the other at $1,200, together at $2,000.

The legatees of "one-fourth of the succession" complain that those two pieces of property should have figured among the assets on the account, besides the acknowledged amount mentioned in it, so as to make the amount to be distributed to be, the money legacies added, $7,497.47. They claim that they should receive one-fourth of that sum, viz: $1,874.36¾; that the pieces of real estate should next be delivered and the legacies paid and that the residue should accrue to the universal legatee.

It is difficult to conceive what plausible reason can be given to resist their demand.

The assets composing the succession of a deceased consist of all the

property of any kind existing at the death and form what is termed the mass. It is only after payment of the debts and charges that there remains a residue, which accrues to the heirs of the deceased of whatever description or class they may be. This is the property which strictly constitutes the succession and over which the benevolence of a testator can operate *ære alieno deducto.* R. C. C. 874. It passes by law where there is no will. It passes by a will where one is made which violates no law. Where a testator gives a share of his succession it is to that *residue* that he alludes and that share is to be taken first out of it as a lump.

As a rule, special legacies have to be satisfied *first*, but a testator may direct otherwise. All depends upon his intention as expressed.

In the present instance, the testatrix has desired that the children of her sister should first receive the fourth of her estate and that the special legacies of the pieces of property and of money be satisfied out of the remaining three-fourths of the residue, after payment of the debts and charges.

The universal legatee, under the terms of the will and under the law, is only entitled to the residue of the succession after satisfaction of the debts and legacies.

The simple reading of the will shows that the legatees of the fourth who are first mentioned, are first entitled to that proportion out of what remained after payment of the debts and charges.

The nephews of the deceased are not legatees under a universal title. They are not bequeathed a proportion of any specified part of the succession. They are instituted special legatees of one-fourth of the entire succession. R. C. C. 1612. They are legatees under a particular title, R. C. C. 1625, to whom the will of the deceased which is law, has reserved a certain proportion of the succession. R. C. C. 1611.

The remaining three-fourths, consisting of the real estate specially bequeathed and of cash, accrues to the other legatees. Those entitled to the pieces of property are to receive them in kind. Those entitled to the money legacies are next to be paid the same.

What remains then accrues to the universal legatee.

The intention of the testator is easily ascertained, is well expressed, and must be carried out as announced. 7 L. 230; 12 R. 64; 12 An. 417; C. C. 1712, (1705.)

It is, therefore, ordered and decreed that the judgment homologating the account be annulled and reversed, so far as it distributes the residue of the succession otherwise, and that said account and tableau be amended by adding to the acknowledged amount therein the gross residue, the inventory value of the real estate bequeathed and the amount of the money legacies, and that one-fourth of the total thereof

be allowed the five children of the sister of the testatrix, amounting to eighteen hundred and eighty-four dollars and thirty-six and three-fourth cents, ($1,884.36¾); that the two pieces of real estate be delivered to the legatees thereof; that the money legacies be paid to the legatees entitled thereto, and that the residue accrue to the universal legatee, the husband of the deceased, as hereinbefore set forth and specified, and that in other respects said judgment be affirmed; said universal legatee to pay the costs of appeal.

Levy, J., absent.

No. 7462.

MRS. LEAUNA JENKS VS. THE HOWE SEWING MACHINE COMPANY.

This case is one for damages, based upon Act No. 62 of 1877, which grants an action against Sewing Machine Companies for removing sewing machines from the premises of the purchasers. *Held*, by the Court, that the Statute has no application to the facts of this cause.

APPEAL from the Fourth District Court for the Parish of Orleans. *Houston*, J.

H. L. Edwards and *H. H. Bryan* for Plaintiff and Appellee.

J. H. Ferguson for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The following are the essential facts of this case:

An agent of defendant had several interviews with the plaintiff, with the object of inducing her to exchange an old sewing machine which she had, for a new one, upon paying a certain difference in value by instalments.

It seems that no very definite agreement was reached, but the agent, anticipating an ultimate trade, carried the new machine to the house, and finding the plaintiff absent and the house in charge of her young daughter, left the new machine there and carried off the old one. No complaint of this action was communicated by plaintiff to the Company.

Subsequently, another agent called on plaintiff to obtain her signature to a printed and written contract. She signed the same without reading it, as she states, but it was subsequently read and explained to her; and, although she states that she complained of the terms not being in accordance with the proposition made to her by the former agent, she does not pretend that she repudiated the contract or demanded the cancellation of her signature, or the return of her old machine and the taking away of the new. On the contrary, she

accepted the situation and kept and used the new machine for some months without protest.

We can discover no ground for annulling this contract for either error, fraud or violence, and think the plaintiff was conclusively bound by it.

By its terms she was to pay thirty dollars in cash, which was paid by the agreed valuation of her old machine, and the balance in instalments of five dollars each, payable on the 2d of June, and of each succeeding month; and it was further stipulated, in substance, that said payments, until completed, were to be accepted as rent for the machine, but, when completed, were to be accepted in full payment of the price thereof; and further, that in case of default in payment, the lease should be forfeited and the Company should have the right to enter and retake the machine.

Plaintiff defaulted in payment during the first three months, never paying a single instalment. In the meantime, L. B. Jencks called several times at the office of the Company and applied for indulgence in the payments and made promises in reference thereto, and finally promised to pay on a particular day, and that in case of failure the Company might send up and get the machine. He did fail, and then the Company sent a man to the house to get the money or the machine. He went and communicated his mission to plaintiff whom he found at home. She asked him to wait till Saturday, which he said he had no authority to do; and she then voluntarily hunted up the attachments of the machine and delivered them to him and permitted him to carry it away without remonstrance or objection.

For this so-called "illegal trespass and seizure" of her machine, the plaintiff claimed in this action $2314, as actual and exemplary damages, and was allowed by a jury one thousand dollars.

The action rests on the provisions of Act 62 Ex. Sess. 1877, which provided that contracts like the one here involved, shall be considered as *contracts of sale*, enforceable for unpaid instalments only by exercise of the vendor's privilege, and forbidding, under penalties, the enforcement of any agreement that the vendor might enter and retake the property without judicial process.

Pretermitting all questions as to the effect to be given to such legislation, it is very plain that it was not intended to inflict penalties or liability in damages, except for trespass and forcibly carrying away property against the will and protest of the transferree.

A case which would fall within the intendment of the Act is presented in the Illinois case quoted so confidently by counsel for plaintiff. 86 Ill. 456. Here we can find no element of a trespass or illegal taking and carrying away. There is nothing to show anything done

in opposition to the protest of plaintiff; or to indicate that, had she denied the right of the party to take the machine or prohibited him from doing so, he would have persisted in that course.

The Company had reasonable ground to suppose that Jencks represented plaintiff in his repeated visits and applications for indulgence in the payments and in his final consent that it should send for the machine; and when, under this supposition, it sent for the machine and plaintiff herself surrendered it without opposition, it seems liable to no imputation of illegal action.

Plaintiff's claim seems to us to have no foundation whatever. We find nothing in the conduct of defendant or any of its agents calculated to produce the pretended terror under which she claims to have acted.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and that plaintiff's demand be rejected at her costs, in both Courts.

Rehearing refused.

No. 7535.

EDWIN TELLE VS. C. B. FISH ET AL.

In a petitory action, the rule is well established, that the plaintiff has the right to meet the title opposed to him, even when it is a tax sale, by all means of attack, as if specially pleaded.

It is equally well established, that parole evidence is admissible to prove simulation and fraud in the apparent acquisition of real estate.

APPEAL from the Fifth District Court for the Parish of Orleans. *Rogers*, J

T. A. Bartlette for Plaintiff and Appellee.

Mott & Kelly, A. C. Lewis, John McEnery and *Ellis & Ellis* for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. This is a petitory action involving the title to a large tract of land in the Parish of St. Tammany, and forming part of "Honey Island," and for $7,500 damages claimed by plaintiff against C. B. Fish and P. F. Herwig, for their wrongful possession by trespass on said tract of land.

For answer, C. B. Fish urged the general issue and called his vendor and co-defendant, P. F. Herwig, in warranty.

The latter joined issue with plaintiff by setting up title under a tax sale made by the tax collector of said parish in January, 1874, and through his vendors and their vendors.

Plaintiff filed a supplemental petition in which he urged that the tax sale invoked by Herwig was fraudulent, unreal, simulated, null and void, which plea was sustained by the District Judge, who recognized plaintiff's title to the property and rendered judgment in favor of Fish, against his vendor, Herwig, for $2,000. Herwig alone has appealed. Both parties claim from E. B. Benton, plaintiff, by purchase, and defendants through the tax sale of 1874.

Defendants and warrantor moved to strike out plaintiff's supplemental petition, and during the progress of the trial objected to the introduction of any evidence under the allegations of said petition on the ground that it was in fact an answer or rejoinder to their answer, which is not allowed under our laws, and objected to all evidence in support of the alleged simulation and fraudulent character of the tax sale, on the ground that a tax sale could not be attacked collaterally, and for the additional reason that the tax collector, the State, the auditor and the purchaser at the tax sale, had not been made parties.

Construing the allegations in the supplemental petition touching the nullity of the tax sale, as mere means of defense urged by plaintiff, and as of no greater importance than objections advanced orally, we find no error in the ruling of the Judge in refusing to strike out the supplemental petition. His ruling on that point and on all the other objections of defendants and warrantor, hereinabove enumerated, is fully sustained by the decisions in the cases of Hickman vs. Dawson, 33 An. 438; McMaster vs. Seward, 11 An. 546, and Maillot vs. Wesley, 11 An. 467, in which the right of plaintiff, in a petitory action, to meet the title opposed to him, even a tax sale, by all means of attack as though specially pleaded, has been recognized as a correct rule of practice.

The objection urged by defendants to the introduction of parol testimony in support of the simulation and fraud charged against the tax collector's sale, on the ground that it was an attempt to prove title to an immovable by parol evidence, is equally untenable. The rule admitting parol testimony to show fraud and simulation is too well established in jurisprudence to require any support by reference to authorities.

An examination of the evidence introduced by both parties on the validity of the tax sale of 1874, leaves no doubt in our minds of the correctness of the District Judge's conclusions, which we reproduce in his own language:

"There is no evidence that the property was seized or advertised according to law. The sale was never recorded and until it was recorded under the law, the auditor could not affirm title. It is too clear to be disputed that all the statutory requirements in tax deed or sheriff's deed must be complied with. I do not regard it as necessary

to enter into a review of the testimony affecting the validity of the tax collector's sale, as shown by the testimony of Mr. Baker, Staples and Badon. I cannot find language sufficiently strong to demonstrate the enormity of the tax collector's acts, proved and to be unmistakably inferred from all the facts of this controversy. They form but an additional circumstance in the past and unfortunate history of this commonwealth."

The judgment appealed from is, therefore, affirmed at appellants' costs.

Rehearing refused.

No. 8386.

RONDEZ & PELAS VS. JEAN BURAS. A. P. ALBERTI, THIRD OPPONENT.

Held, that the tax sale in this case was made under Act No. 77 of 1880, and that the mortgage creditor had the right to redeem the property.

APPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Livaudais*, J.

E. H. McCaleb and *G. J. Denis* for Plaintiffs and Appellees.

T. A. Flanagan, for Third Opponent, Appellant.

The opinion of the Court was delivered by

FENNER, J. The question involved in this case is the right of plaintiffs, as mortgage creditors of Buras, to redeem the latter's property which had been sold for taxes and bought by the third opponent, Alberti.

The evidence satisfies us that the tax sale at which opponent bought was made under Act 77 of 1880, and not under Act 107 of 1880. This is shown by the advertisement, which conforms to the requirements of Act 77, by the date of the sale which was different from that at which it could have been made under Act 107, and by the stipulation, contained both in the advertisement and the deed, that the property sold should be redeemable on the terms and within the delay prescribed in the Act No. 77.

The purchaser is bound by the terms of the sale, and cannot dispute the right of redemption by the owner or his creditors.

Although the property was sold, as well for back taxes as for the taxes of 1880, and although the sheriff's deed refers to Act 107, as well as to Act 77, there is no proof whatever that the property had ever been sold or forfeited to the State for the back taxes, which is a condition precedent to the right of sale under Act 107; and it is besides

evident, that no sale could take place under both Acts at the same time. We must treat the sale as having taken place under the Act 77, with whose terms and conditions the proceedings comply, rather than under Act 107, which is not complied with.

The right and interest of plaintiffs to redeem do not admit of question under Act 77. Unless the property had been sold or forfeited to the State and the time for redemption had expired, plaintiffs' mortgage was not extinguished. There was no proof of such sale or forfeiture or, even if such had taken place, of the date thereof. The constitutional ordinance for the relief of delinquent tax payers did not abbreviate the time for redemption allowed by prior laws, which was two years from the date of sale. Act 96, 1877, Sec. 57. The ordinance only fixed a period within which redemption might be made on the more favorable conditions therein prescribed.

It not appearing that plaintiffs' mortgage is extinguished, their right to redeem must be recognized.

Judgment affirmed at appellant's cost.

No. 8366.

SUCCESSION OF ANDREAS MANSION.

The confession of judgment by the executrix in this case, is considered by the Court as an acknowledgment of the debt of the estate, and prescription does not run against debts thus acknowledged, whilst the estate is being administered.

The note given by the executrix in lieu of the one of the decedent, held by the creditor, is an acknowledgment of the debt of said executrix.

The rule that executors can neither create liabilities nor change the nature of such liabilities of the estate as already exist, is also re-affirmed in this case.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor*, J.

Braughn, Buck & Dinkelspiel for Executrix, Appellant.

R. G. Harris for Opponent and Appellee.

Jos. P. Hornor and *F. W. Baker* on same side.

The opinion of the Court was delivered by

POCHÉ, J. The account of administration presented by the executrix was opposed by H. Mehnert, who claimed to be a creditor for $878.25, and by John Becker, who claimed to be a creditor for $700, and the executrix has appealed from a judgment recognizing both opponents as ordinary creditors in the respective sums set up by them, and ordering them to be paid in due course of administration.

The claim of Mehnert is resisted on the ground of his having sued

Mrs. Mansion, the surviving wife of the decedent and the executrix of his succession, personally on an open account constituting the claim which he now urges against the succession.

The record shows that such is the fact; but that in defense Mrs. Mansion denied her personal liability for said account, and averred that said account was due by her husband's succession. In the same suit, she subsequently filed a confession of judgment, conditioned on a stay of execution until she could effect a sale of the property of her husband's succession, *or as much thereof* as was necessary to settle Mehnert's claim.

As the succession had been opened and she had been qualified as executrix between the date of the institution of the suit and the date of her confession, we construe that confession as an unmistakable acknowledgment of the succession's indebtedness to Mehnert, by the executrix; and we hold that such acknowledgment has had the effect of keeping the claim alive and of suspending prescription during the entire pendency of the administration. 33 An. 305, Cloutier vs. Lemée; Heirs vs. Hornsby, 32 An. 337; Renshaw vs. Stafford, 30 An. 853.

The principles and rules recognized and re-affirmed in the decisions just quoted dispose of all the objections of appellant to the introduction of evidence to show acknowledgments of indebtedness by the executrix, in any other form or manner than that prescribed in Art. 985 of the Code of Practice.

It is not pretended that prescription had accrued when the acknowledgment was made. The plea of prescription cannot be supplied by the Court.

The claim of John Becker is in the shape of a promissory note executed by the executrix, in her capacity, in June, 1880, and made payable six months of the date, and is resisted on the ground that the executrix had no power to contract debts for, or bind the succession by a promissory note.

The record shows that at the death of Mansion in June, 1873, John Becker, a brother of the executrix, held his note for $500, falling due a few days after Mansion's death, and that having made a loan to his sister, the executrix, of $200, for the use of the succession, he delivered to her Mansion's note of $500, receiving in lieu thereof, and to represent the additional sum of $200, his sister's note for $700 on which she paid interests annually and regularly, and which she renewed, by executing another note several times.

We construe these acts of the executrix as an unqualified acknowledgment of the succession's indebtedness to Becker for $500, and that such acknowledgment, followed by an annual payment of interests,

has kept the claim alive and suspended prescription. But we cannot hold the succession liable for the additional sum of two hundred dollars borrowed by the widow Mansion before the succession was opened, as shown by the record; she had no authority to contract a debt on behalf of a succession as executrix, *a fortiori* she was powerless to do so previous to her qualification as executrix. The fact that she used the money thus borrowed in paying another debt of the succession cannot bind the succession. It is well settled in our jurisprudence that administrators or executors have no power to create any liabilities against the estate which they represent, or change the nature of its obligations. 24 An. 83, Succession of Compton; 22 An. 372, Succession of Decuir; 21 An. 287, Livingston vs. Gaussen.

The debt which is shown to have been paid by the widow Mansion with the money borrowed from Becker, might have been successfully resisted in due course of administration, and the succession is not bound by the act of the surviving widow, or even of the executrix, in attempting to change the nature of the obligation.

We, therefore, think that the District Judge erred in allowing opponent Becker's full claim.

The judgment appealed from is, therefore, amended, by reducing the amount recognized in favor of John Becker from $700 to $500, and as thus amended, it is affirmed. Costs of this appeal to be paid equally by the succession and by opponent Becker.

NOTE.—Justice Manning took no part in Delaney vs. Rochereau, *ante* 1123, on the Motion to Dismiss; nor in Renshaw vs. Stafford, *ante* 1138; nor in other cases which, like those, were submitted at the last term and held under advisement until this term, the hearing having been before his appointment.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Louisiana,

In New Orleans, During the Year 1882, and not Reported in Full.

No. 7207.

James A Willard vs. W. Van Norden et al.

This case is similar to that of Marchand vs. Van Norden et al., 33 An. 803, and is decided on the same reasons.

No. 7154.

M. Shelby & Co. vs. Peel & Bird and Wallace & Co.

This is a case of fraudulent preference, decided on the evidence.

No. 8433.

The State of Louisiana vs. John Dimond.

Criminal case. No merit in the appeal.

No. 7475.

Azema & Molaison vs. Jos. R. Warner.

This case involves issues of fact only.

No. 8330.

The State of Louisiana vs. J. Billy Booker.

Criminal case. No merit in the appeal.

No. 8411.

The State of Louisiana vs. Levi Hill, *alias* Free Danday Green.

Criminal case. No merit in the appeal.

No. 8141.

J. W. Steele et al. vs. Mary O'Brien et al.

Seizure of undivided interest of the husband in community property by his creditors, after death of the wife, and injunction by the heirs of the latter. Decided that there is no ground of action for such injunction.

No. 6797.

Louise Chauchon vs. E. Cannon's Heir.

Suit for the price of sale of a schooner. On the rehearing, the case is remanded for further evidence.

No. 7228.

Louise Mire, Widow of Amadeo Landry vs. Boyd & Martin.

This case involves questions of fact mainly, decided upon the evidence.

No. 8468.

Joseph Dreyfus vs. Bernard Ritter.

This case involves questions of fact only, decided upon the evidence.

No. 8145.

Dr. S. D. Gustime vs. Agnes M. Hodges et al.

Effect of registered lease as to third persons, in case of sale of a plantation.

No. 7285.

Firemen's Charitable Association vs. E. Waggaman, Sheriff, and City of New Orleans.

Judgments of the City for drainage taxes set aside for want of citation.

No. 7476.

Jean Cazabonne vs. John Flathers.

This case involves issues of fact only.

No. 8355.

The State of Louisiana vs. Charles Aron.

Criminal case. Verdict set aside and cause remanded for new trial.

No. 8518.

Saml. L. Boyd vs. Jno. L. Corkery. On Intervention of Chas. S. Miles.

This case involves issues of fact only.

No. 8482.

Saml. D. Brawe vs. John W. Clarke.

Appeal dismissed *ex-officio* for want of an order of appeal in the record.

No. 8202.

Succession of Andrew Wells. A. M. Wells, Appellant.

This is a case in which a minor arriving at the age of majority, takes an appeal from a judgment homologating the final account of administration of his tutor's succession. This Court decided that his appeal was that of a third person, but kept his right as such in suspense, and remanded the case for further proceedings. On trial in the lower court, the case thus remanded was decided against said former minor and original appellant. From this last judgment he took no appeal. This Court now dismisses the appeal.

No. 8385.

The State ex rel. Brewster, Criminal Sheriff, vs. Allen Jumel, Auditor.

The matter in dispute less than $1000. This Court without jurisdiction. The judicial fund is not a fund in the case, susceptible of distribution among litigants seeking to be paid out of it.

No. 8336.

The State of Louisiana vs. John Douglass.

Criminal case. No merit in the appeal.

No. 8494.

C. H. Moore vs. E. S. Dennis, Sheriff and Tax Collector.

Injunction maintained against the sale for taxes of property erroneously assessed.

No. 8521.

Manheim Berwin vs. John Osborn.

Appeal dismissed because matter in dispute less than $1000.

No. 8531.

Gregg & Ford vs. H. A. Biossat.

Issues of fact decided upon the evidence.

No. 8500.

H. H. Walsh vs. J. M. Bates, Sheriff et al.

Issues of fact decided upon the evidence.

No. 8434.

The State of Louisiana vs. Jack Williams et als.

Criminal case. No merit in the appeal.

No. 7524.

City of New Orleans vs. Sylvan Pedelshore.

Appeal dismissed because matter in dispute less than $1000.

No. 8556.

Thomas S. Martin vs. Thos. Watts et al.

Issues of fact decided upon the evidence.

No. 8429.

The State of Louisiana vs. Thomas Malloy.

Criminal case. No merit in the appeal.

No. 8436.

The State of Louisiana vs. Henry Keen.

Criminal case, forgery. No merit in the appeal.

No. 8578.

The State ex rel. J. B. Cier vs. Judge Civil District Court, Parish of Orleans.

Prohibition refused by this Court. It is not a case in which it should exercise its supervisory power.

No. 8302.

City of New Orleans vs. Succession of John Davidson.

Issues of fact only involved in this case.

No. 8444.

The State ex rel. H. S. Lang vs. B. S. Labranche, Tax Collector.

Same question as in No. 8443.

No. 8188.

Successions of Matthew and Catherine A. Reilly.

The same issues as in No. 8445.

No. 8296.

George H. Gadon vs. Board of Directors of Public Schools, Etc.

The same issues as in No. 8293.

No. 8562.

J. P. Maritche vs. Board of Liquidation.

The Board of Liquidation, created under the Act of 1874, was without authority to fund the State warrants dated in 1864, which form the subject of this suit.

No. 7562.

City of New Orleans vs. St. Mary's Catholic Orphan Boy's Asylum.

Decision in City of New Orleans vs. Poydras Orphan's Asylum affirmed.

No. 8431.

The State of Louisiana vs. Stephen Ayres, Etc.

Criminal case. No merit in the appeal.

No. 7504.

C. H. Tebault, Tutor, vs. City of New Orleans.

Appeal dismissed. Matter in dispute less than $1000.

No. 8262.

Mrs. A. M. Hennen vs. J. P. Becker et al.

Issues of fact only involved in this case.

No. 8514.

William B. King vs. F. L. Maxwell et al.

Issues of fact only involved in this case.

No. 8157.

Louisiana Oil Company vs. Board of Assessors.

Same questions as in No. 7690.

No. 7676.

Louise Sudour vs. Malvina Huberwald et al.

Agent permitted to prove that a note collected by him did not in reality belong to his principal.

No. 7666.

City of New Orleans vs. G. F. Zimmerman.

A shoemaker liable for license imposed by City Ordinance.

No. 6061.

W. H. Reynolds vs. Joseph Raymond et al.

Privilege on building disallowed for want of proof of registry.

No. 6032.

Henry C. Castellanos vs. Police Jury Parish of St. Bernard.

Case of attorney's fee for professional services, decided upon the evidence.

No. 7620.

City of New Orleans vs. Victor Réaud.

Matter in dispute less than $1000. This Court without jurisdiction. Case transferred to the Court of Appeals.

No. 8364.

James E. Kuntz vs. C. V. Thibaut, Sheriff, Etc.

Sale of property for taxes enjoined on the plea of *res judicata*, which is maintained.

No. 7537.

Avendano Bros. vs. James Mehaffy.

Case remanded upon sworn declaration in this Court by defendant's counsel of certain matters of fact.

No. 7568.

White, Richards & Co. vs. T. H. Handy, Sheriff et al.

Suit to hold Sheriff liable for rents and revenues of property seized and held by him. Decided that the Sheriff was not liable, because the property stood recorded in the name of another person than the seized debtor.

No. 8520.

John I. Adams & Co. vs. Peter B. Compton. A. P. Williams, Third Opponent.

Case involving questions of fact.

No. 8375.

Jos. H. Oglesby and Albert Baldwin vs. Saml. H. Kennedy.

Executory process enjoined, on the ground that the mortgage notes upon which it issued, have been sequestered and their extinguishment alleged in said sequestration suit. The injunction is maintained, and the merits of the controversy are to be determined in the sequestration suit.

No. 8522.

Simon Weill and Bernard Mayer vs. Wm. Samora. Robert Bruckner, Intervenor.

This case involves questions of fact only.

No. 7323.

Mrs. Louisa Miller vs. Mrs. Josephine Kramer, Executrix.

This case involves questions of fact mainly.

No. 7588.

Bredow & Frye and F. Lapiere vs. St. Anna's Chapel et al.

This case involves questions of fact only.

No. 8548.

Succession of John S. Levy.

This case is remanded for further proceedings, with concurrence of all the parties.

Nos. 7636 and 7886.

Charles K. Burdeau vs. Webster & Dillingham.

These cases, submitted together, are decided together. They involved questions of fact only.

No. 8569.

Succession of Mary Ann Berfuse.

Heirs of an intestate succession, pretending to be willing and able to pay all the debts thereof, and therefor enjoining the sale of property by the administrator, should be permitted to prove their heirship. The case is remanded to permit them to do so.

No. 8580.

Lawrence Conroy vs. Wm. E. Huger, Administrator, Etc.

The donation made by the State to the City Insane Asylums in 1879, and collected by the City of New Orleans and passed into its general fund of 1879, remains dedicated to the purpose for which it was given and, so far as unpaid, is a debt due by that fund, which must be paid by preference over general ordinance appropriations of the City.

No. 8456.

Citizens' Bank of Louisiana vs. Allen Thomas. For Monition.

Oppositions of Gay & Tuttle and Others.

In this case, the property for the sale of which the monition was taken, was situated in two parishes, and proof was only made of publication in one parish.

Held, that the judgment rendered, confirming the sale, was erroneous, and that the case should be remanded.

No. 7578.

Dr. Saml. Walker vs. Howard Association of New Orleans.

Question of fact decided upon the evidence.

No. 8495.

M. L. Dowling vs. F. P. Mix, Sheriff, et al.

This case involves questions of fact only.

No. 8621.

The State ex rel. Vinet et al. vs. Wm. Voorhies, Judge City Court of New Orleans.

Prohibition made perpetual against third opponent, who claimed the property seized and alleged it was worth more than $1000.

No. 8555.

Elmore Dufour, Executor, vs. Howard Currie et al.

The presumption of *omnia rite acta* should prevail in this case against the evidence offered to invalidate the attachment proceedings and sale of property thereunder, made so many years before.

No. 8432.

The State of Louisiana vs. Morgan Carter.

Criminal case. No merit in the appeal.

No. 8586.

The State ex rel. J. E. Brown vs. W. T. Houston, Judge Civil District Court, Parish of Orleans.

Application for *Certiorari* and *Habeas Corpus*. Case of contempt of court. *Held*, that the proceedings complained of by the Relator, appearing to be regular and legal on their face, this Court will not interfere; *Held*, also, that this Court has no jurisdiction in cases of *Habeas Corpus*, unless it is its appellate jurisdiction.

No. 8615.

The State ex rel. Willis vs. W. Kennedy, Justice of the Peace, Etc.

Application for *Certiorari*.

A proceeding by rule for the collection of a license due to a Parish, is unauthorized by Act 4 of 1882, Sec. 17, which relates exclusively to licenses due to the State.

No. 8447.

P. A. Jones, Sheriff and Tax Collector vs. G. W. Butter et al.

Recognition of the power of the Police Jury of the Parish of Ascension to levy license taxes, under the present legislation of the State.

No. 8598.

The State ex rel. O'Malley vs. W. T. Houston, Judge, Etc.

Case of contempt of court.

The regular ruling of a Judge on a question of contempt, when the proceedings appear legal on their face, is no more revisable by this Court than his regular ruling in an unappealable case.

No. 8438.

The State ex rel. Harman vs. Wm. Voorhies, Judge City Court, Etc.

Application for *Certiorari*.

Refused. The Relator does not assail the regularity of the proceedings complained of.

No. 8604.

The State ex rel. Berthoud, Treasurer vs. The Judge of the Twenty-Sixth District Court.

Application for *Certiorari* and *Mandamus*.

Refused. The proceedings complained of are regular on their face.

No. 8571.

The State ex rel. Mrs. E. Wallace vs. The Judge of the Second City Court, Etc.

Application for *Certiorari* and Prohibition.

Refused. The proceedings complained of are regular on their face.

No. 8590.

The State ex rel. Routon, Sheriff, vs. The Judge of the Seventh Distrit Court.

Application for *Certiorari* and Prohibition. *Certiorari* and Prohibition do not lie to revise, in an appealable case, the ruling of a District Court vested with jurisdiction, when the proceedings are regular. The Relator is entitled to an appeal from the judgment to be rendered, whether Sections 3591 and 3592 of Rev. Stat. be repealed or not.

No. 8026.

J. F. Johnson vs. J. P. Harrison, Jr.

A commercial agent soliciting business for a cotton factor, for an interest in the profits of the house as salary, will not be held responsible for bad accounts made by him, in the absence of an express agreement to that effect.

No. 8561.

Henry N. Noyes vs. Buckner H. Robertson.

This case involves only questions of fact, decided upon the evidence.

No. 8607.

The State of Louisiana vs. James Cosgrove.

Criminal case. No merit in the appeal.

No. 7844.

Merchants Mutual Insurance Company vs. City of New Orleans.

Same question as in the case of E. St. Romes vs. City of New Orleans, recently decided.

No. 7941.

Charles Small vs. Paul Koerber.

Act No. 44 of 1877 prescribes the mode of drawing juries for all cases, and applies also to contested election cases.

No. 7948.

Charles H. Schenck vs. The Good Intent Tow Boat Company.

Issues of fact decided upon the evidence.

No. 7862.

J. W. Gunther vs. Gunther & Stevenson.

Issues of fact decided upon the evidence.

No. 7928.

Executors of Daniel Edwards vs. James D. Edwards.

Issues of fact decided upon the evidence.

No. 8712.

The State of Louisiana vs. Valentine Fuchs.

Appeal dismissed, the matter in dispute being less than $1000.

No. 8477.

Ernest Sentille, President Police Jury, Etc. vs. Henry Demas et al.

To maintain an appeal in which a parish is either plaintiff or defendant, taken by tax payers as third persons, appellants must allege and show that they have a direct pecuniary interest in the suit, exceeding $1000. In such case, the affidavit of appellants will not be sufficient.

No. 8440.

The State of Louisiana vs. Frank Young.

Criminal case. No merit in the appeal.

No. 7559.

The Merchants Mutual Insurance Company vs. John Lamac et als.

No action lies by a creditor seeking to annul a transfer of property by his debtor, where it appears that the latter has not complied with the obligations required by agreement between him and the transferree. Affirming decision in 30 An. 85.

No. 8632.

The State ex rel. H. Messonnier vs. Judge Civil District Court, Parish of Orleans.

Same question as in the case of the State ex rel. Luminais vs. Judges, Etc., recently decided.

No. 8635.

The State ex rel. McEntyre vs. Judge First City Court.

Same question as in the case of the State ex rel. Rothang vs. Judge Second City Court, recently decided.

No. 8550.

J. A. Dardenne, President Police Jury, Etc. vs. John H. Shanks et als.

This case involves only questions of fact, decided upon the evidence.

No. 7879.

The State ex rel. D. S. Bryon vs. Allen Jumel, Auditor, Etc.

Same question as in the case of the State ex rel. Collens vs. Burke, 32 An. 1218.

No. 7592.

M. Berwin vs. People's Insurance Company.

This case involves only questions of fact, decided upon the evidence.

The State ex rel. New Orleans City R. R. Company vs. A. L. Tissot, Judge, Etc.

Application for Mandamus to compel the District Judge to grant a suspensive appeal from an order dissolving an injunction on bond. Refused on the ground that the injury complained of was not irreparable.

MONROE.

No. 1048.

Huey & Wise vs. R. H. Jones, Sheriff.

This case involves the same question as that of H. T. Smith vs. J. G. Huey et al, No. 1050, recently decided.

No. 1039.

M. & S. Mayo and Husband vs. Vernon Lilly.

This case involves the same question as that of the same plaintiffs vs. N. Brittan et als., No. 1056, recently decided.

No. 1055.

J. H. Mitchell, Agent, vs. Citizens' Bank et al.

This case involves the same questions as in that of J. H. Mitchell, Tutor et al. vs. W. S. Logan, Sheriff et al, No. 1054, recently decided.

OPELOUSAS.

No. 1150.

The State of Louisiana vs. Jacob Parker.

Criminal case. No merit in the appeal.

No. 1148.

J. Grey Thomas et al. vs. J. Little Smith et al.

This case involves only an issue of fact, decided upon the evidence.

No. 1153.

Estate of Thomas B. Cheney, on Relation of Wm. Cheney and Isabella Cheney vs. S. A. Freeman, Administratrix, Estate of R. A. Newell.

Issues of fact decided upon the evidence..

No. 7453.

John B. Marsh vs. S. C. Palfrey.

This case involves only questions of fact.

INDEX.

ACTION.

A creditor may, for his own protection and benefit, assert and enforce a right of his debtor, which the debtor will not and sometimes cannot assert.

W. H. Jack vs. *Harrison Jr. & Co.*, 736.

ACTION OF NULLITY.

Action to annul a sale made under executory process is not an action to annul a judgment, and hence, need not be brought in the *same court* that granted the order of seizure and sale.

This is not an attempt to annul a judgment: plea of prescription of one and two years is therefore not well taken; nor prescription of five years, because in this case prescription was suspended during the marriage, as the suit of the wife would have been prejudicial to the husband.

K. G. Stapleton vs. *Butterfield et al.*, 822.

APPEAL.

From a judgment recognizing the heirs and ordering them to be put in possession, the testamentary executor has an appealable interest.

The objection that the appeal bond filed is not such as required by law, must be made in this Court within the three days after the transcript is filed.

The objection that the surety on the appeal bond is himself one of the appellants, must be first raised in and passed upon by the lower court.

Succession of Robert Y. Charmbury, 21.

Where the cast defendant in an ejectment suit fails to perfect a suspensive appeal and seeks to suspend the order directing the execution of the judgment, offering a mere bond for costs, neither will a prohibition issue to prevent the execution of the judgment of ejectment, nor a mandamus to compel the granting of an appeal. The District Judge had the power to pass upon both the character and sufficiency of the bond. In case of error, the law provides a remedy.

The State ex rel. Gill vs. *Judge, etc.*, 90.

Where an appeal is made returnable to this Court on a particular day, and the transcript is not filed nor time obtained for the registry of it, before the expiration of the delay allowed, the appeal will be dismissed. That the District Judge rescinded the order of appeal previous to the return day, and on a rule to re-instate it, made a decree after the return day has gone by, will be no excuse or justification for the omission to apply seasonably for relief to this Court.

Mrs. DeBouchel vs. *Husband*, 102.

APPEAL—*Continued.*

Where the order of appeal is in the alternative for a devolutive or suspensive appeal, and the bond given is not sufficient for a suspensive appeal, but exceeds the amount fixed for a devolutive appeal, it is a sufficient bond for a devolutive appeal, and the motion to dismiss will not prevail.

Chaffe, Syndic, vs. *Carroll,* 122.

Plaintiffs, about seventy persons in number, are pensioners of the State of Louisiana, and claim, by mandamus against the Auditor, the payment to each, of twelve dollars a month. The District Court made the mandamus peremptory, and the State appealed. The Relators moved to dismiss the appeal on the grounds, that the amount of the matter in dispute is not appealable, and that the State has no interest to hinder and delay the execution of its own law: Act of the Legislature of 1876, No. 61.

Held, that the aggregate amount makes the case appealable, and that the other ground, that the State has no interest, in untenable.

The State ex rel. St. Cyr et al. vs. *Jumel, Auditor,* 201.

This Court will not look out of the transcript and hunt up evidence among the records of other cases, simply because, by agreement of counsel, such evidence is to be considered as if in the transcript, though not placed within the reach of the Court. Affirming the rule declared in Succession of Irwin, 33 An. 63.

This case is remanded to afford the Relator the opportunity of introducing evidence to show that his judgment was based upon a contract with the City of New Orleans, as was done in the case of Nelson vs. Parish of St Martin, 32 An. 884.

The State ex rel. M. Ranger vs. *City of New Orleans,* 202.

If, as alleged by appellee, the transcript was made by the ex-clerk of the court *a qua* and certified to by him under a false date, at a time when he was *functus officio,* the fault not being charged to the appellant, cannot affect him. No *ex parte* evidence, in the shape of affidavits, is admissible to prove the averred falsity.

It is settled beyond contestation, that a bond for costs is sufficient for a suspensive appeal to prevent the distribution of the funds of an estate.

The opposition to the executor's account having been made by the appellant, as natural tutor of his daughter, Regina Ann Nelson, the appeal taken by him as "tutor" will stand.

The office of the Judge *ad hoc* does not terminate with the judgment rendered by him. He has power to grant an appeal therefrom.

After a motion to dismiss the appeal has been overruled, the appellee cannot be permitted to proceed by rule on appellant to show cause why certain evidence should not be received, and, ultimately, why

APPEAL—*Continued.*

the appeal should not be dismissed. All the grounds of dismissal should be urged in the original motion.

It is only where definitive judgments are rendered by the Supreme Court, that applications for a rehearing can be made and entertained; not when the decree is only an interlocutory order.

Succession of Edwards, 216.

The rules in reference to the interruption of prescription cannot be applied to appeals, and the delay fixed by the law, within which an appeal may be taken, cannot be extended by a so-called interruption of that delay, through any proceedings of the appellant.

Heirs of Beaird vs. *S. Russ et al.*, 315.

The plaintiff and appellee having caused the case to be set down for trial on the summary docket, as one entitled to be tried by preference, must be deemed to have waived his rights to a motion to dismiss the appeal on the ground that the bond given by appellant was not such as required by law.

The teachers of the public schools of New Orleans cannot, under the law, be appointed for a longer term than one year.

F. A. Golden vs. *Board Public Schools, etc.*, 354.

A petition for a rehearing must contain substantially the reasons, points and authorities upon which the petitioner relies to obtain a rehearing. When further time is allowed him by the Court, it is only for the purpose of elaborating an argument on the points presented in the petition.

Mrs. R. A. Brown vs. *Stroud, Executor*, 374.

In the absence of the Judge of one of the District Courts of New Orleans, another District Judge of the same Parish could grant an appeal from a judgment rendered by the absent Judge.

When the appellant has prayed for an appeal and filed his bond, within the legal delay, the omission of the Judge to sign the order cannot prejudice the rights of such appellant.

Austin, Receiver, vs. *Scovill et als.*, 484.

An appeal bond is good though the name of the surety is not written in the body of that instrument, if it is signed at the bottom of it.

An executor may take a suspensive appeal on giving bond for costs only. Affirming previous decisions.

P. Coyle vs. *Succession of Creevy*, 539.

To entitle a party to appeal from an interlocutory judgment, the injury need not be irreparable; it is sufficient that it may become so by a final judgment.

In garnishment proceedings in execution of a judgment obtained in an

APPEAL—*Continued.*

attachment suit, the judgment debtor is not a necessary party to an appeal from a judgment between creditor and garnishee.

Katz & Barnett vs. *Sorsby, etc.*, 588.

When there is no evidence, statement of facts or bill of exceptions in the record, and no proper assignment of errors, the judgment will not be reviewed.

Mrs. Nugent vs. *Mrs. Stark, etc.*, 628.

A petition for a rehearing, which does not set forth the grounds on which the complainant charges the judgment is erroneous, though accompanied by a motion for delay to file printed briefs in support of application for rehearing, does not comply with the law, and hence does not retard the operation of the law under which the judgment becomes final.

F. Lacroix vs. *Stewart, etc.*, 639.

A privileged creditor who cumulates, in a contest over an account of an administration, his action to compel recognized creditors to contribute *pro rata* to the payment of his claim, cannot maintain an appeal in this Court, where his claim is not an appealable amount.

Succession of Wellmeyer, 819.

When an order was rendered granting a suspensive appeal, but before the transcript was filed in this Court, a rule was taken to set aside the order of appeal, on the ground of insufficiency of the surety on the appeal bond, which rule was made absolute, and a judgment was rendered revoking the order of appeal after the transcript was filed.

A motion to dismiss the appeal, accompanied by a transcript of the proceedings in the lower court on the rule, with its judgment setting aside the order of appeal, will be maintained and the appeal dismissed.

No appeal will be recognized in this Court without an order of appeal upon which it is based.

Mrs. Weiser vs. *Blaese et al.*, 833.

The appealable or unappealable character of a controversy is announced by the pleadings, but is fixed by the judgment. Hence, a mandamus lies to compel the granting of a suspensive appeal, when at the time the judgment was rendered the case was appealable. A *remittitur* subsequently entered, cannot deprive the party cast of his constitutional right of appeal.

Orleans Railroad Company vs. *Lazarus, Judge, etc.*, 864.

No appeal lies from an order of court commanding the administrator of a succession to present his account.

Succession of V. Carrière, 1056.

APPEAL—*Continued.*

An appeal bond for costs, covering only the costs of appeal, is defective.

Ray, Administrator, vs. *H. D. Shehee*, 1006.

A *remittitur* entered after verdict and judgment does not affect the right of a party to appeal from such judgment.

The appellate court must be governed by the record of the proceedings duly authenticated, and no statement of the Judge of the Court where the proceedings were had, that such record is incorrect, after the same is on file in this Court, and no step taken to correct it, can prevail against the record itself.

City Railroad Company vs. *Lazarus, Judge*, 1117.

The appellant, on the day the appeal was returnable, applied for and obtained an extension of thirty days to file the transcript: *Held*, that the additional delay granted by the Court only commenced to run from the three judicial days allowed by law after the return day.

Delaney and Wife vs. *Rochereau & Co.*, 1123.

Where an appeal is dismissed, on the ground of material deficiency or incompleteness of the transcript, the Court on an application for a rehearing is authorized to observe that the judgment appealed from not having been signed, the application for an appeal was premature and can maintain its previous ruling, for that additional reason.

J. H. Smith vs. *Railroad Company et al.*, 1160.

The right of appeal from an interlocutory decree dissolving an injunction on bond, under Art. 307, Code of Practice, must be tested by the nature of the damages complained of in the petition for injunction.

If, from the pleadings, it appears that such damages can be compensated in money, or otherwise repaired, the injury caused by the order is not irreparable, and no appeal will lie therefrom. Previous decisions affirmed.

W. T. Levine vs. *B. Michell*, 1181.

In those cases where the amount of a suspensive appeal bond vests in the discretion of the judge, that discretion must be reasonable and just, not arbitrary or absolute. It must be a sound judicial discretion.

When an injunction has been dissolved without damages, the rule is that the party cast is required to give a suspensive appeal bond only for costs. It is the injunction bond that is designed to cover losses and to answer for damages.

But there are exceptional cases when the court in its discretion may, and sometimes ought, to fix a bond, when there is an appeal from such judgment of dissolution, in a larger sum than the appeal

APPEAL—*Continued.*

bond, and additional to the amount of the injunction bond, such larger and additional sum varying with and being determined by the circumstances of each case.

S. J. Hart vs. *Lazarus, Judge, etc.*, 1210.

The complaint of an accused that an erroneous charge was given to jury will not be heard or entertained on appeal, if the record does not show that the charge complained of had been given in writing, or that a bill of exceptions had been taken from the charge at the time of delivery.

The State of Louisiana vs. *Curtis*, 1213.

Where suit is brought on a claim for less than a thousand dollars, coupled with a revocatory action to annul a fraudulent sale made by the debtor, so far as it affects the creditor, the purchaser at such sale cannot appeal to this Court from a judgment annulling the sale to the extent asked for, though the property may be worth more than $1000.

The State ex rel. Zuberbier & Behan vs. *Judge, etc.*, 1215.

This Court will not pass upon the whole judgment of the court *a qua* when the latter only granted an appeal from a certain portion of such judgment. The nature of this cause requires that it should be remanded.

Ikerd vs. *Postlewhaite et al.*, 1235.

ASSESSMENT.

The Board of Assessors of the City of New Orleans, may be proceeded against by a taxpayer, in order to have the assessment of his property reduced; and the said Board has authority to stand in judgment for that purpose, after delivery of the rolls, and may be ordered by the Court to change the assessment.

E. J. Gay vs. *Board of Assessors et al.*, 370.

A corporation is liable to assessment for the excess of the market value of its capital stock over and above the value of its tangible property otherwise assessed and taxed. Cases in 31 An. 475, 852, and 32 An. 20, establish this rule, and are to be followed on the principle of *stare decisis.*

Rules in matters of assessment and taxation should be stable, and when once settled, should not be lightly disturbed.

Oil Company vs. *Board of Assessors*, 618.

ATTACHMENT.

An attachment having been set aside by the District Court, and an appeal taken from the judgment, suit was brought on the bond for damages whilst the appeal was pending. Defendant, in the suit for damages, pleaded prematurity. Plaintiff was then allowed by the lower court to amend and aver that since the institution of his

ATTACHMENT—*Continued.*

suit the Supreme Court has decided the attachment case on appeal. *Held*, that the ruling was correct.

The plaintiff's rights in a suit cannot be seized after subrogation, in open court, to such rights in favor of some other party.

When an attachment is dissolved and the judgment is simply one of non-suit, the fact of the dissolution of the attachment is a finality, and entitles defendant to damages for a wrongfully taken attachment.

Though an attachment is taken without malice and under legal advice, defendant is entitled to his actual damages if it is dissolved.

J. J. McDaniel & Co. vs. *Gardner & Co. et al.*, 341.

The threats made by defendant in the premises, that he would dispose of his property to protect himself, if he were sued by plaintiffs, were a sufficient reason for the attachment taken by the latter.

H. & C. Newman vs. *J. Kraim*, 910.

In a suit to recover damages resulting from the illegal attachment of cotton seized as belonging to the debtor in the attachment proceeding, in which proceeding the true owner intervenes and recovers judgment, recognizing his title to the property, the party who had taken out the attachment is liable to the actual damages resulting directly from the seizure, among which may be reckoned all the necessary expenses incurred in the suit to recover the property, and also the actual loss in the price of the cotton whilst under seizure.

If, however, the cotton is sold by consent of parties by the sheriff during the pendency of the litigation and the proceeds go into his hands, and he fails to pay over the money to the party entitled to receive it, such party cannot recover the amount from the attaching creditor as part of the damages resulting from the attachment. The loss is caused by the delinquency of the officer, and does not result immediately from the seizure.

Frank & Co. vs. *Chaffe & Sons*, 1203.

ATTORNEY-AT-LAW.

Where an attorney-at-law is employed to collect certain judgments, his fees are not exigible until the judgments are collected or their collection shown to be impossible.

The death of the client does not dissolve such contracts, and the attorney can and should continue his services to accomplish the purpose of his employment, unless prohibited to do so by the legal representative of the accused. And where the attorney is not thus forbidden to act, the death of the client does not have the effect of itself to make the fees of the attorney exigible.

Successions of Z. and E. Labauve, 1187.

ATTORNEY GENERAL.

The intervention of the Attorney General in this case, in the name of the State, unauthorized by any legislative action, does not bind the State to any of the judicial averments or pleadings of such intervention

N. O & Carrollton R. R. Co. vs. *New Orleans*, 429.

BANKRUPTCY.

The provisions of a composition are binding, when confirmed, only on the creditors whose names and addresses and claims are shown in the debtor's statement produced at the meeting at which the resolution has been passed. The composition does not affect or prejudice the rights of other creditors who did not make themselves parties.

Payment of the claim by the first partner subrogated him to all the rights of the creditor against the second partner who assumed the debt. Judgment affirmed.

Mrs. Lisso vs. *Navra & Offner et al.*, 1111.

BATTURE.

The alluvion or batture that forms upon the shores of Lake Pontchartrain is not susceptible of private ownership, such alluvion does not therefore become the property of owners of lots fronting on said Lake.

It is the accretion made by rivers and streams only, that belongs to the proprietors of the adjacent lands.

Mrs. Zeller vs. *Southern Yacht Club*, 837.

BILLS OF LADING.

Bills of lading taken by a consignor in his own name and held by himself, establish no title in the consignor, which he did not possess without them.

The bailee of goods who has fully and in good faith accounted to his bailor therefor, cannot be held responsible by third persons of whose adverse claims he was not notified.

Miss Dickson vs. *Chaffe & Sons*, 1133.

COLLATION.

The value of slaves donated in 1859 by a father to his daughter as *avancement d'hoirie*, (his succession being opened later in the same year) must be collated notwithstanding the abolishment of slavery. The case is governed by the Code of 1825, not of 1870.

Ventress, Executrix, vs. *Brown et als.*, 448.

COMMUNITY OF ACQUETS AND GAINS.

When the surviving husband, after mortgaging the community property, has been recognized by the Probate Court as sole heir of his deceased wife, in default of descendants, ascendants, or collaterals, the mortgage will be legal upon the whole property, and the

COMMUNITY OF ACQUETS AND GAINS—*Continued.*

seizure and sale of such property, by foreclosure of the mortgage, will convey a valid title to the purchaser.

J. M. Billgery vs. *Widow Billgery et al.*, 387.

Property adjudicated to a married heir at a succession sale and paid for out of her heritable share, becomes her separate property, and does not fall into the community between her and her husband. Affirming Troxler vs. Colley, 33 An. 425.

C. Vavasseur vs. *S. Mouton, Administrator*, 1044.

CONSTITUTION OF 1879.

The case of the accused not having been allotted, as required by Article 130 of the Constitution, to the Judge of Section A of the Criminal District Court of the Parish of Orleans, in which he was tried, the judgment is illegal and he is entitled to a new trial.

The accused was in time to make the objection, before judgment and sentence.

The State of Louisiana vs. *Gaetano Addotto et al.*, 1.

The holder of a warrant in the general fund under an appropriation which is not imperatively required to be made by, and the amount thereof fixed in the Constitution, is not entitled to be paid out of said fund concurrently with the holders of constitutional warrants for salaries fixed by the Constitution.

In such a proceeding the court is not authorized to look beyond the pleadings and grant other relief than that specifically asked.

The State ex rel. University vs. *Burke, Treasurer*, 404.

The special drainage tax levied by the Police Jury of Terrebonne Parish is unconstitutional and void, because by a previous levy of a ten mill tax they had exhausted their power.

The present Constitution does not impair any contract existing by virtue of Act No. 6 of 1878, between the State and Terrebonne Parish, for the power to levy the tax authorized by this Act is not abrogated, but with legislative authority a tax can be levied to continue this work of public improvement.

Act No. 33 of 1879 contains nothing inconsistent with the present Constitution; on the contrary, Art. 214 of the Constitution gives it vitality, and by it the taxing power for levee purposes is conferred directly upon the Levee Commissioners.

The State ex rel. Morgan's R. R. Co. vs. *Cage, Sheriff*, 506.

The Register of Conveyances has no preference over a deputy clerk for his salary, out of the judicial fund, the salaries of both constituting judicial expenses.

Art. 146 of the Constitution, by declaring that all judicial expenses shall be paid by preference out of the special judicial fund, declares by

CONSTITUTION OF 1879—*Continued.*

implication that the rights of all those who constitute the judicial organization for the Parish of Orleans are of equal rank and dignity.

The State ex rel. Arnauld vs. *Burke, Treasurer*, 548.

CONSTITUTIONAL LAW.

The law under which the levy of taxes to satisfy plaintiff's judgments is claimed, having been repealed, and there being no evidence in the record that said judgments were based upon a contract with the municipal corporation, which such repeal would impair, plaintiff is not entitled to the levy.

The State ex rel. Fish vs. *Police Jury, etc.*, 95.

Act No. 60 of the Extra Session of the Legislature of 1872, establishing a Hospital for small-pox and other contagious diseases, did not constitute a contract with the plaintiff, protected from impairment by subsequent legislation.

J. J. Hayes vs. *City of New Orleans*, 311.

The City of New Orleans, in the absence of a judicial decree, could not legally, of its own accord, levy a tax beyond the constitutional limitations, to pay its debts.

The State ex rel. Samory vs. *New Orleans*, 469.

The vested rights of plaintiff under his judgment could not be affected by subsequent legislation.

The right of plaintiff to be paid by assessments in the years 1874, 1875, 1876 and 1877, as ordered by the judgment in his favor, is not lost or destroyed by the fact that such assessments were not properly made. This case is different in that respect from that of Nelson vs. Parish of St. Martin, 33 An. 1122.

There being no evidence in the record that plaintiff's judgment against the municipal corporation was based upon a contract, he is not entitled to the proceeding prayed for to enforce the levy of a tax beyond the constitutional limitation; but his right to proceed anew and make the proper showing is reserved.

C. D. Favrot vs. *Parish, etc.*, 491.

Relator's right to a tax to satisfy his judgment against the Parish is to be determined by the law in force at the date of his contract.

The limit of taxation, fixed by law at the date of his contract, and the constitutional enlargement of the limit to ten mills, had been exhausted by the parochial authorities at the date of the mandamus. A mandamus to compel the Police Jury to levy a tax to satisfy Relator's judgment was, therefore, improperly granted.

The State ex rel. Stewart vs. *Police Jury, etc.*, 673.

A *mandamus* lies to compel the city authorities to levy a special tax to

CONSTITUTIONAL LAW—*Continued.*

satisfy a judgment rendered on the City's matured bonds and coupons, where a *fi. fa.* issued is returned *nulla bona.*

Laws in force at the date of the contract, providing for the means of executing the obligations of the same, forming part of the contract, cannot be repealed; neither can the remedy be suppressed, to the injury of the obligee, but they may be replaced by legal provisions for another adequate or equivalent mode of enforcement; otherwise they impair the obligation of a contract.

The registry law of 1870, (Act 5) cannot affect a contract entered into in 1854, so as to retard or stay the execution of the obligations thereof. If enforced in this case, it would have that effect.

The State ex rel. Morris Ranger vs. *City*, 1149.

CONTRACTS.

The construction upon plaintiff's premises and delivery to him of a cotton press constructed unskilfully, and not in accordance with the contract, was an *active* violation of the contract, which *ipso facto* placed defendants in default, without the necessity of any formal putting *in mora.*

The press being erected upon brick foundations on the premises of plaintiff, the taking possession and making use of the same by him was no waiver of the claim for damages.

L. A. Levy vs. *M. Schwartz & Bro.*, 209.

Insubordination and disrespectful conduct of the employee towards his employer is a sufficient ground for his discharge and the rescission of the contract of employment.

C. W. Railey vs. *W. Lanahan & Son*, 426.

Without express stipulation to the contrary, "advances" include not only necessary supplies, but also goods furnished a plantation store, open only to the laborers and employees on the place.

An agreement for a consideration on the part of the lessor, that he will not seize the leased place for rent until the factor is reimbursed for advances, enures to the benefit of the lessee, and will enable him, as well as the factor, to recover damages for the lessor's violation of said contract.

L. B. Cain vs. *B. Pullen*, 511.

When the act states that the consideration of the *dation en paiement* is a donation to the wife of her father's undetermined interest in a commercial partnership, without any accompanying inventory of the partnership assets, and the alleged donor did not join in the act; and where, in a suit for separation of property, the court had refused to recognize such an item, said *dation en paiement* must be considered a nullity.

CONTRACTS—*Continued.*

This case is not one covered by the Code, which provides that even if the consideration expressed does not exist, the act will be valid if sufficient consideration is shown. By that is meant such consideration as was contemplated by the parties at the time of execution of the act, but which was misdescribed in said act.

Chaffe, Syndic, vs. *Mrs. Scheen,* 684.

CORPORATIONS.

The corporate existence of the New Orleans and Carrollton Railroad Company, under the terms of its Act of Incorporation, of the 9th of February, 1833, expires on the 9th of February, 1883, such corporate existence having been limited to fifty years. The Act of 1835, amendatory of said Act of 1833, did not extend to twenty-five years longer the existence of the Company, as claimed. The two Acts of the legislature provided for the construction of two distinct railroads: the one from New Orleans to Carrollton, and the other from Carrollton to Bayou Sara.

No rule is better settled than that charters of incorporation are to be strictly construed against the corporators.

Courts are unanimous in their strong disfavor of repeals by implication.

N. O. & Carrollton R. R. Co. vs. *City of New Orleans,* 429.

By-laws of a corporation to be valid must be consistent with the general law, and cannot affect the rights of third parties without their consent, or depositors not privy to them.

Gordon & Gomila vs. *Muchler, etc.,* 604.

As a general principle, courts have no jurisdiction to appoint receivers for corporations in the absence of express statutory authority.

The Supreme Court has recognized no exceptions to this rule, unless when the corporate property is abandoned, or when there are no persons authorized to take charge of or conduct its affairs.

Such power has never been claimed in case of an existing corporation, whose charter has neither expired nor been declared forfeited, and which is equipped with competent officers.

P. M. Baker vs. *Portable R. R. Co.,* 754.

The Consolidated Association of the Planters of Louisiana is liable, as well as the State of Louisiana, on the bonds issued by the latter to the order of, and endorsed by the former, under the terms of Act No. 19 of 1828.

The pledge provided for by Sec. 6 of said Act, of all the mortgage obligations furnished to said bank, is in favor of the bondholders and is valid.

They are entitled to interest on their unpaid interest coupons from the time of default.

CORPORATIONS—*Continued.*

Where payment of a debt is secured by a pledge, prescription does not run as long as the pledge exists and the debt remains unpaid.

Where, by legislation, the time for paying matured obligations is extended, without the consent of the holders thereof, the act affects the value of the claim, impairs the obligation of a contract, and is a nullity.

Where funds, which should be applied to the payment of the matured debts of an insolvent corporation in liquidation, are directed by statute to be invested in the purchase of State bonds, without the consent of the creditors, the act is unconstitutional and void, as impairing the obligation of a contract.

Where, in the charter of a corporation, or by subsequent legislation forming part of a contract with bondholders, the mode of liquidation of the concern is not provided for, it is lawful for the legislature to remedy the omission by providing for an adequate mode of liquidation.

Forstall vs. *Consolidated Association, etc.*, 770.

Where the heirs of a president and treasurer of a corporation are sued for moneys alleged to have been received by deceased in his said capacities, and they set up that the only money so received was Confederate money, and of which a tender was made, such an allegation does not constitute an admission of liability or indebtedness for the amount so tendered, and hence, does not authorize a judgment against them for that amount.

Such a tender does not preclude defendants from pleading prescription against the demand.

Where more than ten years have elapsed since the deceased, in his capacity as president and treasurer, rendered the last account of his administration of the affairs of the corporation, the plea of prescription must prevail.

Southern Mut. Ins. Co. vs. *Pike et als.*, 825.

In a certain sense, shares of stock in a corporation represent an interest in the corporate estate, and a conveyance thereof is a conveyance of such interest. But it is not a particular interest in particular property, but simply an interest in the rights and property of the corporation, *whatever they may* be, and subject to the corporate obligations.

The transferrer of stock, without representation or specification as to the particular property held by the corporation, warrants only his title to the stock, and not the title of the corporation to the property held by it.

In absence of fraudulent concealment or misrepresentation, failure of

CORPORATIONS—*Continued.*

title of the corporation to its property, furnishes no ground for action of nullity of transfers of stock, based on error or breach of warranty.

The State of Louisiana vs. *Railroad Company*, 947.

The State legislature has unlimited power to erect bridges and railways, and make any other public works across navigable waters, subject only to the paramount authority of the national government.

The power granted by the legislature to a railway company to build a road between two points, carries authority to cross navigable waters and to build necessary drawbridges, and this authority implies the right and imposes the duty to maintain and repair or rebuild such bridges. A railway company having authority to build or rebuild a bridge across a navigable stream, is not responsible in damages for temporary obstructions of the stream by scaffolding, or by the construction of a temporary stationary bridge, and for unavoidable delay in the completion of the bridge.

J. Hamilton vs. *Railroad Company*, 970.

Notes executed by a stockholder of the Citizen's Bank to represent a stock loan, identified by authentic act with the original stock mortgage, are fully secured by the stock mortgage, which is binding as a loan mortgage, even on third parties, without an inscription of the new act in the proper office.

The failure, neglect or refusal of a stockholder of that Bank to pay the stipulated instalment and interest on his loan when due, operates of itself a forfeiture of his right to renew his stock loan note, which thence becomes due and exigible, according to law, in capital and interest of ten per cent.

Mitchell, Tutor, vs. *Sheriff et al.*, 998.

The law is well settled, that the franchises and corporate rights of a company and the means vested in it for the purpose of its existence, cannot be granted away and transferred by any act of its own, or by any adverse proceeding, unless with the consent of the original grantor, formally expressed. In the absence of any provision to that effect, either in the general law or in the charter of such company, the franchise cannot be levied upon for debt.

The *franchise*, so termed, in this case, is nothing more than a right of way or license conferred by the Municipal Ordinance, and cannot be treated as a corporate right, which derives only from sovereign dispensation. It is, in this instance, only an incident of the corporate existence of the Company, as created by law, and determines with the extinction of such corporate life.

Hence, neither the franchise or corporate rights, nor the right of way of the Company, have passed at the bankruptcy sale.

Spanish Fort Railroad Company vs. *Delamore*, 1225.

COURTS.

It is well settled, that the Court has the right to correct its minutes, so as to have them to conform with the truth, by a correct statement of facts, at any time, even after appeal.

The State of Louisiana vs. *G. Howard*, 369.

The Civil District Court is legally open from the third of July to November, for probate matters; a judgment rendered in such matters is of full force and effect, and an appeal therefrom, granted on motion legally obtained.

Succession of Berfuse, 599.

CRIMINAL LAW.

EVIDENCE.

The confession made by the accused whilst incarcerated, to a police officer is admissible in evidence, when neither threats nor promises were offered by the latter to obtain the said confession.

It is now well settled that the deposition taken before a magistrate, at a preliminary examination, and contradictorily with the accused, of a witness who died afterwards, is admissible in evidence on the trial of the prosecution.

The State of Louisiana vs. *Maimée Alphonse, et als.*, 9.

In the absence of timely objections from the accused, the Court will not exclude evidence of a confession made by him, because preliminary proof was not offered by the prosecution to show that the confession was made freely and voluntarily, unless it appears from the evidence itself that the confession was obtained from the accused by means of promises or threats.

The State of Louisiana vs. *Davis*, 351.

The confession of the accused, made whilst he was in the hands of his captors, who were not officers of the law, and after they had put a rope round his neck, cannot be considered as a voluntary and free confession, and should not have been received in evidence by the lower court.

The State of Louisiana vs. *H. Revells*, 381.

The testimony of a witness, taken contradictorily with the accused at the preliminary examination, is admissible at the trial, if the witness is then absent from the State.

The failure of the committing magistrate to require of the witness that he should furnish his recognizance, does not operate against the State to show such want of proper diligence as should exclude the testimony.

Is it not necessary, in order to render an accessory liable as a principal, in a charge of manslaughter, that he should have been *actually* present at the homicide; such presence may be constructive.

The State of Louisiana vs. *Douglass*, 523.

CRIMINAL LAW—*Continued.*

The admission as evidence to be considered by the jury, of the statement of the deceased made in presence of the accused, but not as a dying declaration, was illegal and vitiated the verdict.

Mere silence of the accused when the deceased said in his presence that the said accused had shot him, cannot be construed as an acquiescence.

The State of Louisiana vs. *M. Diskin*, 919.

Evidence of prior acts, declaration and threats of accused, though not part of the *res gestæ*, is admissible when they legitimately tend to establish motive or intention in the accused to commit the crime with which he is charged, and for that purpose only.

Refusal of the Judge *a quo* to grant a new trial, on the ground of newly discovered evidence, supported only by the affidavit of the accused, will not be disturbed in this Court. Prior authorities affirmed.

The State of Louisiana vs. *T. Edwards*, 1012.

Evidence is admissible to show that after the time of the commission of the crime, the accused had in his possession similar coin to that which he is charged with having stolen. The objection to such evidence is to its effect, not to its admissibility.

This Court will not disturb the action of the Judge *a quo* in refusing, in the exercise of his sound discretion, a new trial, applied for on the ground of newly discovered evidence. Affirming previous decisions.

It is only in case of gross and unambiguous error that this Court will sustain objections to the written charge of the Judge to the jury, when such objections are not presented in bills of exception.

The State of Louisiana vs. *Beaird et al.*, 104.

The question of the admissibility of the defendant's confession is one of law and fact mixed, inasmuch as said confession is admissible according as it was voluntary or not; it is, therefore, reviewable by this Court.

The ruling of the Judge *a quo* on a question of this character, unless clearly erroneous, should not be disturbed.

The State of Louisiana vs. *Bartley*, 147.

Under the special plea of temporary insanity, the *onus probandi* is upon the accused and not the prosecution, and the alleged insanity must be proved beyond a reasonable doubt.

The State of Louisiana vs. *F. DeRancé et als.*, 186.

When stolen property is found in the possession of the person charged with larceny, it is for the accused to show how he came by said property, and it is for the jury to decide whether his account or explanation of such a fact is reasonable or sufficient, or not. Such

CRIMINAL LAW—*Continued.*

account is not to be taken for true, simply because the prosecution does not rebut it.

The State of Louisiana vs. *A. Kimble*, 392.

Where a party is indicted for perjury, for having falsely sworn in a previous prosecution that he had been shot by the person prosecuted, his declaration to the same effect, made shortly after the shooting took place, in explanation of a slight injury to his head, is not admissible in his favor on the trial for perjury. It was not a part of the *res gestæ* of either prosecution.

The State of Louisiana vs. *David Williams*, 959.

In a preliminary examination, the accused has the right of having the testimony of witnesses in his behalf, taken down in writing, certified and preserved, and the testimony of a witness thus taken will be admitted in evidence at the jury trial, if the witness is shown to be absent, a non-resident of the State, and not obtainable; without any fault of the accused.

The State of Louisiana vs. *C. B. Stewart*, 1037.

In a criminal prosecution the accused has a right to object to the admission of an implied confession resulting from an offer to compromise, on the ground that it was not voluntary, and where a witness has testified that the confession was not induced by promises or threats, the accused should be allowed to offer rebutting proof going to show that he was forced to make the offer in question, and the refusal of such offer, and the admission of the confession, in spite of it, is sufficient to vitiate the verdict and cause the remanding of the case.

The State of Louisiana vs. *Platte*, 1061.

What identity of the offenses charged is necessary to support the pleas of *autrefois convict* and of *autrefois acquit*.

Proof of a different crime from the one charged, though generally objectionable, is admissible when both offenses are closely linked or connected, especially in the *res gestæ*, and also when such proof is pertinent and necessary to show intent.

When parties are engaged in the commission of a crime with malicious intent, and in the execution thereof perpetrate another criminal act not originally intended, the unintended act derives its character from the intended crime, and the original malicious intent affects both acts.

The State of Louisiana vs. *Lee Vines et al.*, 1079.

Evidence to show the absence and sickness of the witness and consequent impossibility of procuring his attendance, is admissible, in

CRIMINAL LAW—*Continued.*

aid of the sheriff's return of non-service, as a foundation for the introduction of his testimony taken on preliminary trial.

The State of Louisiana vs. *Granville et al.*, 1088.

The appearance bond of defendant and its forfeiture for his non-appearance are proper evidence to go to the jury, like evidence of concealment, flight, etc.

The State of Louisiana vs. *Wingfield*, 1200.

The testimony taken on preliminary examination of a witness who is a non-resident, only accidentally present in the State at the time, and who has never since been here, will be competent evidence at the trial of the accused, where the latter was confronted with the witness at the preliminary examination and was afforded the opportunity of cross-examining him.

The State of Louisiana vs. *J. Jordan*, 1219.

INDICTMENT.

The verdict of "guilty of involuntary manslaughter," in this case, is legal and responsive, though the indictment charged the accused with voluntary manslaughter.

The State of Louisiana vs. *Thomas Griffin*, 37.

Though the accused was indicted jointly with another defendant, he may be tried alone, and the fixing of the case for trial against him alone, is virtually ordering a separate trial.

Evidence was properly received of the resistance offered by the accused to the search made for the stolen goods.

Burglary and larceny may be charged in the same count of the indictment without invalidating this instrument for duplicity.

The State of Louisiana vs. *William Johnson*, 48.

The previous service of a copy of the indictment on the accused is not necessary for the legality of the trial, in cases not capital, or in which the punishment is less than seven years at hard labor.

The State of Louisiana vs. *Ceran Briggs*, 63.

The indictment in this case is framed in accordance with Section 1048 of the Revised Statutes, and is good for a case of murder by poisoning, though the means by which the murder was committed, the poisoning, is not stated in said indictment.

Article 8 of the present Constitution did not repeal said Section 1048, and does not require any more than the latter does, that the indictment should state *the means* used to commit the murder.

Evidence of the poisoning was, therefore, admissible under the charge of murder.

The State of Louisiana vs. *Bartley*, 147.

CRIMINAL LAW—*Continued.*

An indictment for larceny is valid though it does not say grand or petit larceny, inasmuch as the value of the object stolen is stated. 28 An. 315, 24; 31 An. 61.

The State of Louisiana vs. *S. Dilworth*, 216.

Though the indictment in this case is not in the *exact* words of the statute under which it is framed, viz: Section 911 of the Revised Statutes, (providing for the punishment of persons keeping gambling houses) yet the said indictment charges the offense in equivalent words and is valid.

Article 172 of the Constitution of 1879 did not repeal said Section 911 of the Revised Statutes.

The State of Louisiana vs. *George*, 261.

An indictment charging the accused with feloniously and knowingly receiving the property, and that "he well knew the same was stolen property," is in sufficient conformity to the statute.

Nor is it necessary that the indictment should state who stole the property, or from whom the accused received it.

The charge that the accused *stole* the goods is sufficient, without the further averment that he took and carried them away.

Nor does the statute make any formal requirement as to the mode of expressing the criminal intent of stealing the property.

The State of Louisiana vs. *Moultrie*, 489.

The State has the constitutional right to repeal in criminal cases, where the indictment has been quashed before a trial, or held bad upon a demurrer, and where it purports to charge an offense punishable with death or imprisonment at hard labor.

In such cases the State is not required to furnish an appeal bond, as she cannot be condemned to pay costs.

A judgment quashing an indictment on the ground of the unconstitutionality of the Statute under which the charge is brought, when the accused has not been tried, as to his guilt or innocence under the charge, will not be a bar to a subsequent prosecution of the accused under the same charge.

The State of Louisiana vs. *M. Taylor*, 978.

It is not necessary that an indictment should show, on its face, that it was found during a session of the court, when that fact appears from the minutes in the record.

Where the finding, endorsed on the indictment, is signed "A. Wartelle, Foreman," and the minutes show that "Armand Wartelle" was appointed foreman, *held*, sufficient.

Sec. 1048, Rev. Stat., dispensing with the necessity of setting forth in indictments for murder, the manner and means in and by which

CRIMINAL LAW—*Continued.*

the death was caused, is not inconsistent with Art. 8 of Constitution of 1879. Affirming State vs. Bartley, 34 An. 147.

The State of Louisiana vs. *Granville et al.*, 1088.

Under the charge in an indictment of stealing *chickens*, proof is admissible to show that *hens* were stolen.

The State of Louisiana vs. *G. Bassett*, 1108.

Where an indictment for burglary contains two counts, charging respectively a higher and lower grade of the offense, and the jury are instructed that if they find the accused guilty, they must return a verdict of "guilty of first count," or "guilty of second count," as the case may be, and in disregard of such instruction they return a general verdict of guilty, the Judge is authorized to refuse to receive such verdict, and a final verdict of "guilty of second count," rendered after again retiring, will not constitute such an irregularity as to vitiate the sentence upon it.

The State of Louisiana vs. *J. G. Disch*, 1134.

In an indictment for obtaining goods under false pretenses, where amongst the pretenses it is charged that the accused represented that "he wanted to buy goods on credit, in the fair and usual course of trade, etc.," and that on the faith of such representations, the goods were delivered to him, this sets out such a *colloquium* as to a bargain of sale as connects the delivery of the goods therewith, and will support the indictment without more specific statement of the nature of the bargain.

The State of Louisiana vs. *J. Jordan*, 1219.

INFORMATION.

An information for assault by wilfully shooting, under Sec. 792, R. S., need not allege that the shooting was done with a dangerous weapon.

The State of Louisiana vs. *Cognovitch*, 529.

JURY.

Act No. 98 of the legislature of 1880, did not repeal Act No. 138 of 1877, which provides for the drawing of tales jurors in criminal cases in the Parish of Orleans, under certain circumstances. The order made by the Judge *a quo* for an additional drawing was not, therefore, illegal.

It is the duty of the District Judge to carefully abstain from any expression of opinion or comment upon the facts of the case, in a criminal prosecution, not only in his final charge to the jury, but also in his rulings upon the admissibility of evidence, in the presence of the jury. But the complaint of the accused on this point is unfounded in the premises.

CRIMINAL LAW—*Continued.*

A juror, who is by conscience opposed to capital punishment, is incompetent. But, in this case, the juror having already answered that he had no such scruples, the Judge *a quo* was right in not allowing defendant's counsel to repeat the question.

The State of Louisiana vs. *Maimée Alphonse et als.*, 9.

By the provisions of Act No. 35 of the legislature of 1880, the Judge has the power, for the trial of cases where the penalty is not necessarily imprisonment at hard labor, to order the drawing of a special jury; and it is not necessary that such jury should be ordered for the first week of the term.

The State of Louisiana vs. *Ceran Briggs*, 69.

Ruling of this Court on the qualifications of jury commissioners, in 33 An. 1229; 32 An. 193, re-affirmed.

The State of Louisiana vs. *Beaird et al.*, 104.

The motion to quash the venire was properly overruled, in the absence of a charge of fraud, or averment of a great wrong or injury caused to the defendant.

The accused was not entitled to a new trial on the ground that the evidence at the inquest was taken along by the jury, together with other papers, in retiring to deliberate, and that the table in their room of deliberations was covered with law books, to which they had access.

The State of Louisiana vs. *Harris*, 118.

A juror is competent when, being examined on his *voir dire*, he swears, in substance, that the opinion which he had formed and expressed against the accused will yield to the evidence, and that he can do impartial justice between the State and the defense. Affirming previous decisions.

The State of Louisiana vs. *F. DeRancé et als.*, 186.

In the absence of specific objection and affirmative proof to the contrary, it will be presumed that the grand jury was legally organized. 30 An. 885; 31 An. 380, 91, 368, 378.

The State of Louisiana vs. *S. Dilworth*, 216.

The grand jury is presumed in this case to have been regularly organized.

The State of Louisiana vs. *George*, 261.

The Judge is not absolutely bound by the answer of the juror on his *voir dire*, that he has, or has not formed an opinion, when such answer is contradicted by the facts or circumstances of the case.

The State of Louisiana vs. *Barnes*, 395.

When a juror, after his examination on his *voir dire*, has been accepted

CRIMINAL LAW—*Continued.*

by the prisoner and sworn, the court may yet discharge him upon discovering from the statement and further examination of said juror that he is opposed to capital punishment.

The State of Louisiana vs. *Miles Diskins*, 919.

A juror is not incompetent under the Statute, who says on his *voir dire* that he does not know the meaning of perjury, when at the same time he says he knows what false swearing means.

If, in his charge to the jury, the Judge does not misstate the law, nor express any opinion as to the facts, there is no ground for avoiding the verdict on account of his charge.

Nor will the verdict be avoided because a document was delivered to the jury on their retirement, which was offered in evidence on the trial.

The State of Louisiana vs. *David Williams*, 959.

The District Judge has, in the selection of jurors, a discretionary power, which should be trusted to a great extent, and his ruling in such matters should not be disturbed unless manifestly erroneous.

The State of Louisiana vs. *E. Welsch et al.*, 991.

Section 7 of Act No. 44 of 1877, does not repeal or conflict with Section 992 of the Revised Statutes, requiring, in certain criminal cases, the service on the accused of the list of the jury which are to pass on his trial, two entire days before his trial.

The list of jurors ordered to be drawn by the Judge, in the exercise of the discretion vested by Act 44, Section 7, must be served on the accused, in accordance with Section 992, Revised Statutes.

The State of Louisiana vs. *C. B. Stewart*, 1037.

The act of a juror, sitting in a capital case, who leaves the jury box during a recess of the court, and crosses the courthouse for the purpose of consulting a physician about his health, said juror being sick, and having permission for such consultation under the eyes of the sheriff, does not constitute a separation, or such misconduct as will vitiate the verdict.

A juror who swears that he is opposed to capital punishment is not competent to sit on the trial of a murder case.

A juror who swears that he has formed an opinion, but that the same is based on mere rumor, and that it will readily yield to the evidence, is competent.

The State of Louisiana vs. *Lee Vines et al.*, 1073.

It is not required that talesmen should be summoned only from the bystanders.

The State of Louisiana vs. *Thomas et als.*, 1084.

CRIMINAL LAW—*Continued.*

Where a juror is challenged by the accused as incompetent on account of a defective memory, and the Judge, after examining the juror, decides that he is competent, such ruling being on a matter strictly within his discretion will not be disturbed on appeal, unless the error is palpable.

The State of Louisiana vs. *V. Eloi*, 1195.

MITIGATION.

Unskilful treatment of the deceased is not a ground for acquittal of the accused, in a case of murder, when the wounds have been inflicted with a murderous intent.

The State of Louisiana vs. *Barnes*, 395.

In a trial on a charge of murder, the accused has the right to show and prove previous threats of the deceased against him, and the dangerous character of the deceased, as evidence tending to rebut the presumption of malice, and to mitigate the offense charged. Held, that after such evidence had been introduced, the District Judge erred in giving the following special charge:

"That if you find the accused made the first assault at the time of the killing, then *you should disregard the evidence of previous threats and of the dangerous character of the deceased.*"

The State of Louisiana vs. *McNeely*, 1022.

SENTENCE.

Where the sentence of the Judge *a quo* condemned the accused to additional labor on the public streets of Monroe, in default of payment of costs. *Held*, that that portion of the sentence is illegal, and must be annulled.

The State of Louisiana vs. *Salone Brannon*, 942.

In criminal cases, it is not necessary that the judgment be drawn up by the Judge and kept in the record as a separate and distinct proceeding. It is enough that it be noted and entered in the minutes by the clerk.

Nor are the words: "It is considered," sacramental and essential in such judgment.

Nor is such judgment impaired because it provides for the fixing of the time of execution by the Governor.

Nor is it necessary that such judgment should contain the reasons upon which it is founded, as in civil causes.

Nor is it necessary that such judgment be signed.

Article 66 of the Constitution, granting to the Governor the power of reprieving, pardoning, commuting sentence, etc., is not designed to suspend indefinitely the execution of the sentence passed upon the criminal.

The State ex rel. Pringle vs. *Sheriff, et al.*, 1069.

CRIMINAL LAW—*Continued.*

In criminal cases, the judgment needs not be signed, nor need reasons be given for it.

The State of Louisiana vs. *Thomas et als.*, 1084.

A sentence not containing the words "*it is considered*," is legal and valid. The use of the words is not sacramental.

The State of Louisiana vs. *G. Bassett*, 1108.

STATUTES.

The defense, that Section 788 of the Revised Statutes, providing for the punishment of the *crime against nature*, with which the accused is charged, does not define the offense or describe any crime known to the common law, is without foundation.

The State of Louisiana vs. *Charles Williams*, 87.

Act No. 8 of the Extra Session of 1870, entitled an Act relating to crimes and offenses, is not unconstitutional.

The State of Louisiana vs. *M. Taylor*, 978.

The proviso or last clause in Section 986, Revised Statutes, which reads: "Nothing herein contained shall extend to any person absconding or fleeing from justice," is intended as a means of interrupting prescription, when pleaded in bar of a prosecution for certain offenses; and is not intended to apply to the status of the accused at the time that it is proposed to prosecute, try or punish him.

It is not necessary that he should be absconding or a fugitive from justice at the moment of the prosecution. It suffices that he should have absconded or fled after the commission of the deed charged against him.

The State of Louisiana vs. *Lee Vines et al.*, 1073.

Embezzlement is not an offense at common law, but was created by Statute. Embezzle includes in its meaning appropriation to one's own use, and therefore the use of the single word embezzle, in the indictment or information, contains within itself the charge that the defendant appropriated the money or property to his own use.

The simplification of criminal pleadings was commanded by this State in her first criminal Statute directing the common law forms to be divested of unnecessary prolixity.

The State of Louisiana vs. *M. Wolff*, 1153.

TRIAL.

The State is not under obligation not to have the accused tried before the regular term of court, because the latter has furnished bond to appear at such regular term.

The accused was entitled to a continuance in the premises, on account

CRIMINAL LAW—*Continued.*

of the absence of a material witness. The refusal of the continuance entitles him to a new trial.

The refusal of the continuance, involving a question both of law and of fact, the action of the lower court is reviewable by this Court. Previous decisions affirmed.

The State of Louisiana vs. *Ceran Briggs*, 69.

Under the circumstances of this case, and the showing made by the defendant, a continuance should have been granted by the court *a qua*. Its refusal entitles appellant to a new trial.

The State of Louisiana vs. *Horn*, 100.

It is not necessary that the accused be personally present in court at the trial of the motion for a new trial.

The State of Louisiana vs. *Harris*, 118.

The accused, not having requested the court to give a more detailed or complete exposition of the law of self-defense in its charge to the jury, cannot afterwards make the alleged want of fulness of the said charge a legal ground for the reversal of the judgment.

The State of Louisiana vs. *F. DeRancé et als.*, 186.

Newly discovered evidence tending to impeach or discredit a witness, who has testified in the case, affords no legal ground for setting aside the verdict and granting a new trial.

The State of Louisiana vs. *Lou Young et al.*, 346.

The minutes of the court *a qua*, as transcribed in the records, show that this case was allotted to Section B of said court, in which the accused was tried. This differentiates it from the Addotto case, 34 An. p. 1, and shows that the accused is not entitled, on this ground, to a new trial.

The State of Louisiana vs. *Shellang et al.*, 349.

The attorney appointed as Judge *ad hoc* declining to act as such any longer, it was legal and proper for the lower court to appoint another attorney as such Judge *ad hoc*. Nor was it necessary that the said attorney be a resident of the parish in which the case was tried, being a resident of the District of which the parish formed part.

A continuance was properly refused, under the circumstances of the case.

Orders relating to the separation of witnesses during the trial, are matters peculiarly within the discretion of the lower court.

The State of Louisiana vs. *H. Revells*, 381.

The power of the District Court to correct its minutes so as to make them conform with the truth, is recognized and well settled in our jurisprudence.

CRIMINAL LAW—*Continued.*

The fact that in passing a sentence of death on a criminal, the District Judge fixes in his judgment the day and date of the execution, a duty devolving upon the Governor, does not vitiate the judgment or the trial, and will afford no relief to the defendant on appeal. That portion of the sentence will be considered as unwritten.

The Supreme Court will not review the refusal of a new trial on a motion involving questions of law blended with facts, unless the grounds are incorporated in a bill of exceptions.

The State of Louisiana vs. *J. Chatman*, 881.

The Judge may have referred to a witness of the defendants as a *willing witness*, in ruling over a point of evidence, in the trial of the case, without thereby violating the principle that the Court must not comment upon the facts before the jury.

The State of Louisiana vs. *E. Welsch et al.*, 991.

It is not the duty of the court, nor is it proper to announce to the jury, abstract propositions of law not involved in the pleadings or evidence of the case.

There is no reason to make the motion for a new trial, when overruled, the subject of a bill of exceptions.

There is no objection to the Judge's reading from the book, from which he is quoting, in delivering a written charge to the jury.

The State of Louisiana vs. *Thomas et als.*, 1084.

As soon as the affidavit or charge against an accused and other proceedings had in the case before the committing magistrate are forwarded to the proper criminal court, the prosecution must be construed as having been instituted in the latter court.

At that phase of the prosecution, the cause may be legally apportioned between the Judges of the Criminal District Court, Parish of Orleans; and such an apportionment is a compliance with the requirements of Art. 130 of the Constitution, providing that all *prosecutions instituted* in said Court, shall be apportioned by lot between the Judges. A complaint by the accused, that his case was not properly apportioned, because it was allotted before indictment or information, will not be heard. Judgment affirmed.

The State of Louisiana vs. *J. Williams*, 1198.

The Judge did not err in refusing to charge that the open and undisguised possession of the animal alleged to have been stolen, in the public streets and in company with others, "was incompatible with the guilt of the accused."

The State of Louisiana vs. *Wingfield*, 1200.

VERDICT.

A verdict must be responsive to the indictment. So where a person is

CRIMINAL LAW—*Continued.*

charged with burglary and the jury return a verdict of guilty of trespass, the Judge does not err in sending the jury back to the jury room in order that they may render a legal verdict. The verdict of trespass was not responsive to the charge of burglary. And the Judge may refuse such verdict, though he may have erroneously instructed the jury that such a verdict could be returned, and may correct his error.

The State of Louisiana vs. *J. G. Disch*, 1134.

DAMAGES.

Damages granted by the court for the illegal seizure of plaintiff's property, after notice given to the seizing creditor that the said property did not belong to the judgment debtor, but to the plaintiff.

Widow Chapuis vs. *T. S. Waterman*, 58.

Plaintiff, whilst riding in one of the defendant Company's cars, had rested his arms on the sill of the open window, out of which his elbow thus projected a few inches. Another car of the Company, coming down the adjoining track, as it passsed by, struck plaintiff's arm and broke it, the intervening space between the two cars, at that particular point of the road, being so narrow as to cause the accident,. *Held*, that the Company, as a carrier of passengers, should have taken the proper precautions to avoid such accidents and is responsible for the damage suffered by the plaintiff. *Held*, also, that there was no contributory negligence in the position of the plaintiff.

Application of defendant to remand the case on account of newly discovered evidence, refused.

A. M. Summers vs. *Crescent City Railroad Company*, 139.

The driver of the car which ran over plaintiffs' infant child and killed him, was guilty of no negligence or fault, under the circumstances of the case, and the Company cannot be held responsible.

Hearn vs. *St. Charles Street Railroad Company*, 160.

Where one of two persons, either innocent or mutually negligent, must suffer, the one who knew of the cause which occasioned the injury, and who could have avoided it and did not do so, must bear the loss.

Levy vs. *Carondelet Canal, etc.*, 180.

In a suit for damages for malicious prosecution, the presumption of want of probable cause following from the acquittal or discharge on preliminary examination of the accused, can be successfully rebutted by evidence showing that the party provoking the prosecution acted on information reasonably calculated to cause and lead a man of ordinary caution and prudence to believe or enter-

DAMAGES—*Continued.*

tain an honest and strong suspicion of the guilt of the party accused.

In such a case, a corporation will be exonerated from damages for a charge or accusation made by one of its authorized officers.

S. Plassan vs. Louisiana Lottery Company, 246.

Act No. 9 of 1874 is constitutional. It was so decided by the Supreme Court.

The fact that it was subsequently pronounced unconstitutional by a District Court on an application for *habeas corpus* does not make it such.

Therefore, the defendant Company, acting with probable cause, cannot be responsible in damages.

Augusti vs. *Lottery Company et al.*, 504.

Railway companies carrying passengers over long journeys, are bound to provide easy modes and to allow a reasonable time to their passengers to obtain food and necessary refreshments.

They are bound to furnish safe and proper means of ingress and egress to and from trains to the eating stations, whether said eating houses be under the control of the railroad or a third person.

This obligation includes the duty of providing sufficient lights for the safety of their passengers going to or coming from meals had at night, and giving them correct information as to the exact location of their respective trains, when trains have been moved during the absence of the passengers at their meals.

Passengers receiving injuries for want of sufficient light and correct information of the whereabouts of their train on returning from the eating station, are entitled to recover damages against the company.

Mrs. Peniston vs. *Railroad Company*, 777.

The judgment of a justice's court ejecting an occupant of a house under the laws of landlord and tenant, charged to be null and void in an action of damages for wrongful ejectment, cannot be inquired into collaterally, if regular in form and valid on its face.

A plaintiff in an ejectment suit is not responsible for the manner in which the officer charged with the execution of the judgment performed his duty, unless he instructed him or directed his course in the premises.

Mrs. A. Huyghe vs. *H. Brinkman*, 831.

The right of action for damages, under Article 2315, C. C., does not survive in favor of the husband of the deceased.

A druggist is held liable in damages, in the premises, for having sold Sulphate of Zinc instead of Epsom Salts.

T. J. Walton et al. vs. *A. B. Booth*, 913.

DAMAGES—*Continued.*

When an injury would not have happened, except for the culpable negligence of the party injured, concurring with that of the other party, no action can be maintained.

A railroad company is not liable to a passenger for an accident which he might have prevented by ordinary attention to his safety, even though the agents in charge of the train are also remiss in their duty.

Woods vs. *Jones, Cowan & Knowlton et als.*, 1086.

Exemplary damages will be allowed against a party who makes a violent assault on another, whom he strikes and wounds, without provocation.

In such cases the Supreme Court will not hesitate to ignore the verdict of a jury which had allowed only nominal damages; and will assess such damages as the nature of the case demands and the interest of justice requires.

J. H. Scheen vs. *W. M. Poland*, 1107.

Defendant sold furniture to plaintiff for a price paid partly in cash and partly in notes, and it was at the time agreed, that if the notes were not paid at maturity, defendant could retake the furniture.

Held: that, notwithstanding non-payment of the notes, such agreement did not authorize defendant to enter the home of plaintiff in his absence, without his consent and without notice, and to take away the furniture.

Under the particular circumstances of this case, the court refused to disturb a verdict for $750—holding that the small value of the furniture did not affect the question—the unlawful entry of the pauper's hovel and abstraction of his scanty possessions being an injury identical in character and magnitude with the like entry of a palace and despoiling it of its gorgeous apparel.

Van Wren vs. *H. Flynn*, 1158.

This case is one for damages, based upon Act No. 62 of 1877, which grants an action against Sewing Machine Companies for removing sewing machines from the premises of the purchasers. *Held*, by the Court, that the Statute has no application to the facts of this cause.

Mrs. Jenks vs. *Sewing Machine Co.*, 1241.

DEPOSIT.

The irregular deposit of money with a bank or banker, is subject to the legal understanding that the money will be payable only on demand of the depositor. The latter's right of action only accrues after proper demand, and prescription only begins to run from the date of such demand and refusal.

DEPOSIT—*Continued.*

Private unincorporated partnerships conducting the business of banking, are "merchants" within the meaning of C. C. 2248, and their books cannot be given in evidence in their favor.

Mrs. Brown vs. *Pike et al.*, 576.

A bank cannot apply funds on deposit to the payment of a debt due it by the depositor; compensation never takes place in such a case without the special assent of the depositor.

Our law differs from the common law doctrine, that where a check has been presented to, and acceptance refused by a bank, there being no privity, the holder of the check cannot sue the bank.

A check duly notified to the bank constitutes an equitable assignment of the fund against which it is drawn. Case vs. Henderson, 23 An. 49, overruled. *Obiter.* There is no distinction to be made between the irregular deposit of the customer with his factor and that of a depositor with a bank.

Gordon & Gomila vs. *Muchler, etc.*, 604.

DIVORCE.

Where a judgment from bed and board is rendered in a suit by the husband against the wife, who reconvenes and prays for a divorce, and it does not say in whose favor it is rendered, the Court will infer that it was rendered in favor of the wife, where the custody of the issue of the marriage is given to her, and the community is condemned to pay costs.

On a subsequent proceeding for a divorce, each claiming the benefit of the judgment and alleging the expiration of one year and absence of reconciliation, the Court will pronounce judgment in favor of the wife, and award her the custody of the child on a prayer for the amendment of a judgment against her, appealed by the husband.

J. Eskholm vs. *W. E. Rau*, 246.

DONATIONS.

An informal and invalid donation may be confirmed and ratified by the heirs of the donor, and this ratification needs not be by express act, but may be shown to result from the general conduct of the heirs. C. C. 2274.

Ventress, Executrix, vs. *Brown et als.*, 448.

Where a donor has imposed a charge on the donee in favor of third persons who have accepted the same, the donor cannot revoke the donation, as far as such third persons are concerned.

Executors may prosecute to final judgment an action brought by the testator to annul a donation *inter vivos* made by him.

A qualified acceptance of property received as a *dation en paiement,*

DONATIONS—*Continued.*

and subsequent acts amounting to a judicial revocation of such acceptance, prevent one from afterwards claiming title under such *dation en paiement.*

Without proof of fraud exercised, or violence used towards them, by their agent, major heirs are bound by his acts, when within the scope of the authority conferred upon him.

Where a testator bequeaths as a legacy a certain sum of money, or a certain estate, the legatee, upon his acceptance of the latter, is bound to pay all legacies which were imposed as charges upon said estate by the testator.

In the case at bar, the legacies imposed as charges on said estate, by the evident intention of the testator, are to be paid only out of the revenues of said estate after the maintenance of the forced heirs has been secured out of such revenues.

Therefore, the liability of the forced heirs, to whom the estate was left, for the special legacies, imposed as charges on said estate, is not personal, but is confined to the revenues of said estate; in other respects, the opinion delivered in this case, reported in 30 An. 718, approved and re-affirmed.

Eskridge vs. *Farrar, Agent, etc.*, 709.

DRAINAGE.

The owner of the lower lands of two adjacent estates can do no act which would impede the natural flow of water on his lands from those of the higher estate. Hence, a dam or levee erected by the owner of the lower estate, across a natural drain, receiving waters naturally flowing from his and his neighbor's lands, will be declared illegal and abated as a nuisance.

The owner of the superior estate may make all drainage works which are necessary to the proper cultivation and to the agricultural developments of his estate; to that end he may cut ditches and canals, by which the waters *running* on his estate may be concentrated, and their flow directed or increased beyond the slow process by which they would *ultimately reach the same destination.*

But such owner cannot improve his land to the injury of his neighbor; and hence, he will not be allowed to cut ditches by which the waters running on his lands would be diverted from their natural flow, and concentrated so as to be thrown on his neighbor's lands, at a point which would not be their natural destination; nor will he be allowed to drain by means of ditches on his neighbor's lands waters which would remain stagnant on his own lands.

J. T. Ludeling vs. *F. P. Stubbs*, 935.

DRAINAGE TAX.

In the matter of the Board of Assessors, etc., judgments obtained for drainage taxes, under the provisions of Acts No. 165 of 1858, and No. 30 of 1871, against property in the Fourth Drainage District, are nullities, having been obtained by proceedings unauthorized by law. Ruling in Succession of Patrick Irwin, 33 An. 63, affirmed.

Board of Administrators, praying, etc., 97.

A judgment for a drainage tax will not be enforced, where it is shown that the property, far from being benefitted, was injured by the alleged drainage. The consideration of the judgment, which was prospective, having failed, the eventual debtor is, in law and equity, entitled to relief from the judgment. Drainage warrant holders depend for payment upon the collection of drainage taxes legally due and exigible, and cannot be paid out of any other fund.

H. Davidson, Executrix, vs. *City of New Orleans, etc.*, 170.

EMINENT DOMAIN.

The State, in the exercise of her police powers, has the exclusive right to determine the propriety, location and mode of building levees within her borders. After she has thus decided and has contracted for the public enterprise, a citizen, riparian owner, on whose land the levee is about to be built, cannot effectively remonstrate and require that it be constructed differently. In case of non-compliance with his demand by the Board of Public Officers in charge of the work, and in the event of subsequent damages sustained by him, he cannot hold the State liable either for compensation, as for property taken for public purposes, or for the injury sustained by him in consequence of the destruction of the same. It is *damnum absque injuria*.

Bass vs. *State of Louisiana*, 494.

ESTOPPEL.

The doctrine of estoppel applies to the State as well as to private individuals. 28 An. 462.

The State of Louisiana vs. *A. G. Ober*, 359.

EVIDENCE.

The strong circumstantial evidence in this case is sufficient to establish the alleged simulation of the sale to defendant.

Mrs. A. Villars, Wife, etc. vs. *L. Faivre*, 198.

Article 2278 of the Civil Code, which requires that the acknowledgment of the debt of a deceased person should, in order to interrupt prescription, be proved by written evidence, signed by the debtor, or by his specially authorized agent, does not require that the

EVIDENCE—*Continued.*

proof of the special authority should be also in writing. Such authority may be shown by verbal evidence.

Succession of Edwards, 216.

Where a creditor attacks a sale made in the name of a third person, for the occult benefit of his debtor, the burden is upon him. Where the evidence affirmatively supporting the transaction has not been rebutted, the sale will not be disturbed.

Chaffe & Sons vs. *Lisso et als.*, 310.

The evidence is insufficient in this case, under Article 2278 of the Code, to show the interruption of prescription on the note sued upon, which is that of a deceased person.

Lehman, Abraham & Co. vs. *Estate of Mahier*, 319.

The lower court also correctly received evidence of the assault and battery committed by plaintiff upon defendant, as part of the *res gestæ* of a quarrel between the parties, during which the opprobious epithets complained of by plaintiff were used by defendant.

A juror cannot be asked on his *voir dire*, "whether or not he had any bias or prejudice against suits of this sort," (which is an action for damages on account of slander.)

This Court, in the opinion, reproves the nature of such a suit, which is that of a strong and young man, the son-in-law of defendant, who, after cruelly beating his father-in-law, claims $10,000 damages against him for libel.

B. T. Young vs. *J. J. Bridges*, 333.

In case of variance in the sheriff's deed of sale and his return on the writ, as to the identity of the adjudicatee, it is the deed of sale which governs. Though the adjudicatee in this case signed the deed of sale as tutrix, the sheriff's recital in the deed showing that the adjudicatee bought the property in her personal and individual capacity, the title is hers and not her ward's. The sheriff's deed is complete without the adjudicatee's signature, which adds nothing to it nor detracts anything from it.

M. Carroll et al. vs. *Scheen et als.*, 423.

It is competent to establish by parol a subsequent change or modification of a written contract.

L. B. Cain vs. *E. Pullen*, 511.

The plea of insanity, urged by defendant as caused by habitual intemperance, is repelled by the Court.

The doctrine is well settled, that the plea of want of consideration of a promissory note given as for value received, does not throw the *onus probandi* upon the plaintiff, even when he is the payee of the note.

J. P. Kearney vs. *Succession of Whitehead*, 531.

EVIDENCE—*Continued.*

This is a suit to annul and cancel three notes secured by mortgage, which plaintiff alleges he signed without consideration and through fear of bodily injury.

Where notes secured by mortgage are signed by plaintiff before a notary, with the full knowledge of tenor and contents of both notes and mortgage, the burden of proof is on him to show that he signed through fear of personal violence.

Plaintiff has not satisfactorily established such threats of violence, or the connection between the threats made and the business transaction of signing said notes and mortgage several weeks after the alleged threats were made.

E. Couder vs. *Oteri et al.*, 694.

This is virtually a suit against one person to pay the debt of another. The promise to pay the debt of another, to be binding, must be in writing, signed by the promissor.

A representation made with no intention to deceive, but from an honest belief, gives rise to no liability because erroneous, although parties to whom such representations were made, acted upon the faith of them.

Schmidt & Ziegler vs. *Kent et al.*, 816.

The Articles of our Code fixing the lapse of time essential to establish the presumption of death from absence, without being heard of, apply to cases where the absence is the *only* circumstance supporting the presumption of death.

Death, like other facts, may be established by circumstantial evidence, when direct evidence is not obtainable; and when absence without tidings concurs with other attendant and supporting circumstances to produce the conviction that the party is dead, such proof is all that can be required.

Mrs. Boyd vs. *New England Life Ins. Co.*, 848.

As the *proces verbal* is evidence of the sale, its recitals must control, and not the signatures of parties, which are unnecessary in law, and will, in such a case, be considered as surplusage.

Heirs of Nesom vs. *Weis et al.*, 1004.

EVICTION.

An actual physical ouster is not indispensably necessary to constitute an eviction.

If a final decree of a competent court establishing title in a third person is shown, the loss of the land will be considered certain. The putting such decree in evidence by the party against whom it was rendered is a virtual dispossession and compulsory, because the decree commands eviction, and is enforceable.

St. Romes vs. *City*, 1201.

EXECUTORY PROCESS.

An order of seizure and sale cannot legally issue in favor of an alleged endorsee of a promissory note, payable to the order of the payee, without *authentic* evidence of the endorsement. Nor does the stipulation in the act of mortgage securing the note, to the effect, "that the payee or his transferree may proceed to enforce the same by seizure and sale," dispense with such proof of the endorsement.

When the application is made for such order on a note of the description stated, by one claiming to be syndic, and there is no authentic proof of the payee's endorsement, the application must be accompanied by proper evidence of the assignment, and the syndic's appointment, to warrant the order.

Chaffe, Syndic, vs. *Carroll*, 122.

Where an injunction issues against executory process, on the ground of extension of time by the plaintiff, the debtor's evidence must be positive and precise to show such fact. It will not otherwise be entitled to weight, particularly when contradicted by two disinterested witnesses, whose testimony was even superfluous in this case.

People's Bank vs. *Ballowe*, 565.

An order of seizure and sale is not a judgment in the legal sense of the term.

Its only element, in common with a judgment, is the fact of its being liable to be reviewed on appeal.

Mitchell, Tutor, vs. *Sheriff et al.*, 998.

EXPROPRIATION.

In a proceeding of expropriation for the construction of a railroad, the jury of freeholders cannot, by their verdict, instead of assessing the money value of the property and damages, require the railroad company to do certain work for the benefit of the party who is to be expropriated.

N. O. & Pacific R. R. Co. vs. *Murrell*, 536.

Lands taken by the public for a particular use of any kind, by the exercise of the power of expropriation, cannot be applied to any other use, to the detriment of the landholder.

Where a building erected on land, expropriated for the purpose of a railroad station, is used as such, but a private business is carried on in certain rooms by one who is the agent of the railroad, and receives his compensation in being allowed the use of these rooms, in which railroad freight is however stored when necessary, it is not such a diversion by the railway from the use for which the land was expropriated, as to authorize an action for damages.

N. Hoggatt vs. *Railroad Company*, 624.

EXPROPRIATION—*Continued.*

The obvious meaning and intent of Section 4 of Act 14 of 1876, the legislative charter of the plaintiff Company, were to secure Shreveport as the northwestern *terminus*, and to prevent the Company from evading this requirement by building connections to other possible termini, under the name of branches, before completing the line to Shreveport. The Company had the right to begin its route at Baton Rouge, or to build *via* that point, and the construction of the Baton Rouge branch, while the main line was in process of completion, did not violate the spirit or meaning of the law.

Our expropriation laws and the summary proceedings therein, are not violative of the present Constitution of the State.

The route to be pursued by the road is not among the issues submitted to the jury under the expropriation proceedings.

N. O. & Pacific Railroad Co. vs. *Robertson*, 865.

FUNDING BOARD.

The duties of the Funding Board under Act No. 104 of 1880, are ministerial, and may be enforced by mandamus.

Judgment having been rendered in favor of the Relators for their claim against the Charity Hospital of New Orleans, *and for the interest thereon*, in their original suit against the Board of Administrators of said Charity Hospital, the Funding Board cannot refuse to fund the amount of such interest as well as of the principal of the judgment, on the ground that the funding, under the Constitutional Ordinance and the Statute, is an act of grace on the part of the State, which cannot be extended beyond the express words of the law, in which the funding of the interest is not provided for.

The State ex rel. Smith & McKenna vs. *Funding Board*, 197.

GARNISHMENT.

When an insurance company made garnishee, answering interrogatories, declares that it issued to the judgment debtor a policy on a stock of goods for a stated amount; that said stock was burnt out, but the loss had not been adjusted, the judgment creditor cannot, on the face of the answer, obtain a valid judgment ordering the company to adjust the loss within a given delay, or else pay his judgment.

The judgment creditor has no greater rights than the assured, and cannot exercise them without previously fulfilling all required conditions precedent.

Katz & Barnett vs. *Sorsby, etc.*, 588.

HABEAS CORPUS.

A *habeas corpus* will not issue where the prisoner, who had furnished bail before the committing magistrate, for his appearance before

HABEAS CORPUS—*Continued.*

the District Court presided over by the same officer, is ordered by the latter, after a true bill for manslaughter has been found, to be confined, and refuses to furnish a new bond. It requires no proceeding to authorize the Judge to issue such an order, which is in the nature of a bench warrant.

The State ex rel. Thomas vs. *C. A. Bruslé, Sheriff*, 61.

HOMESTEAD.

The plaintiff, in this case, is not entitled to an *urban* homestead, under the Constitution of 1879, against the execution of a judgment rendered in favor of his creditor and against him, in the year 1877.

J. O. Poole vs. *Cook, Sheriff, et als.*, 331.

The right of defendant to his homestead existed prior to the Constitution of 1879, under the law of 1865, and was not impaired or affected by the provisions of the former, except as to the necessity of recording his claim to such homestead under the requirements of the subsequent legislation, with which he complied.

Ben Gerson & Son vs. *A. C. Gayle*, 337.

Rent of a house leased by the year to the deceased who, by contract with another person, saw bound to provide such, the latter paying housekeeping expenses and supplying the wants of the family of both, is a debt chargeable to the succession from and after the death of the lessee. Such rent is to be deducted from the $1,000 homestead allowed to the necessitous minors of the deceased, as they occupied the house. Relieving them from such deduction would be to give them the amount fixed by law for their relief. The law, being in derogation of common right, must be strictly construed. Such rent is not chargeable to the executor, on the ground that he should have rented such premises and not permitted them to be occupied by the necessitous orphans of the deceased.

P. Coyle vs. *Succession of Creevy*, 539.

Money received by the widow and minor children of a deceased person from benevolent societies of which he was a member, and due to his family at his death, should be deducted from the one thousand dollars allowed by law to the widow and the minor in necessitous circumstances.

The difference between the alleged value and the price brought at public auction of certain insurance scrip should not, however, be charged to the administratrix and deducted from the one thousand dollars.

An opposition filed after an account of administration has been homologated, in so far as not opposed, comes too late.

Succession of Wellmeyer, 819.

HOMESTEAD —*Continued.*

Under the homestead provisions of the Constitution of 1879, the exemptions therein provided only take effect from the date of registry, as provided by law, and are inoperative against debts contracted prior to such registry.

Succession of Furniss, 1013.

A person cannot claim the benefit of the homestead laws, on the ground that she has brought up and is supporting in her house orphan children, who constitute her family and are dependent upon her for such support.

Homestead laws are to be strictly construed.

A. E. Galligar vs. *J. U. Payne et al.*, 1057.

The rights of the minor children or of the widow of a deceased debtor, claiming under the provisions of the homestead law of 1852, must be tested under their condition or situation as existing at the date of the death of the deceased, and not at the date of the settlement of the succession. If the widow, or any one of the minors, even though the latter be not the issue of the widow, possess in his or her own right $1000, nothing can be allowed under the homestead law.

Succession of Agenor Lessassier, 1066.

HUSBAND AND WIFE.

Neither party is entitled to the separation from bed and board, when the wrongs complained of are reciprocal between husband and wife.

J. A. Castanédo vs. *Wife*, 135.

A charge by the wife, as a ground for separation from bed and board, that her husband had fled from justice when charged with an infamous offense, is not sustained if the evidence shows that the charge was made after the husband's departure, and that the husband, on being informed of the charge, returned and presented himself for trial, after which he was discharged, and satisfied the claim of the complainant against him.

The forbearance of a wife and her patience, enduring the cruel treatment, excesses and outrages of her husband for a long time, before complaining to the courts, must not be confounded with or construed as condonation or reconciliation, as contemplated in our laws, in bar of the wife's action for separation from bed and board.

Charges of an outrageous character made by the defendant in an answer to a suit for separation, cannot be considered as an element of excesses or cruel treatment, in favor of plaintiff. The issue must be tendered on acts which have preceded the institution of the suit.

C. Terrel vs. *J. R. Boarman*, 301.

HUSBAND AND WIFE—*Continued.*

In cases where the rights of creditors, forced heirs or other third persons are in no manner affected, the declarations and admissions of the husband, made at a time not suspicious, that certain property belongs to his wife and was acquired by her, in her own right, by purchase or otherwise, in the absence of any charge of fraud or error, are legal and proper and sufficient evidence against himself or persons claiming through him. And such admissions may be proved under the general issue. Affirming previous decisions.

Mrs. R. A. Brown vs. *Stroud, Executor*, 374.

Where a judgment of separation was rendered, but no execution issued, under which any seizure was made, for more than a year afterwards, it will not be considered a *bona fide* non-interrupted suit, as is required, in order to obtain payment of the wife's claims.

Where there is no return made of the writ, there is no evidence that execution ever issued.

Chaffe, Syndic, vs. *Mrs. Scheen*, 684.

The husband, as head and master of the community, has the right to dispose of its movable effects by onerous title, or even by gratuitous and particular title.

Whatever be the rights of creditors, the wife can only attack such gratuitous dispositions of movables, on allegation and proof that they were fraudulently made for the purpose of injuring her.

Cotton et al. vs. *Cotton et al.*, 858.

Transfers made by the husband, in satisfaction of genuine paraphernal claims of the wife, are excepted from the general rules governing the revocatory action. Affirming 33 An. 532; 30 An. 745; 8 An. 485.

Thompson & Co. vs. *Freeman et al.*, 992.

In a suit to evict the wife from property transferred to her by her husband, in satisfaction of her rights against him, the latter may be a witness on his own interest as warrantor.

Shantz and Wife vs. *Stoll*, 1237.

INJUNCTION.

An injunction should not be granted to forbid the execution of a judgment rendered by another court, under which judgment no writ of execution has been issued or applied for. Such an injunction practically amounts to an action in nullity of the judgment rendered, which could only be entertained by the court which rendered the judgment. C. P. Art. 108; 29 An. 108, 375.

Injunctions are only designed to prevent an actual or impending injury, which does not exist in this case. 33 An. 222; 29 An. 271.

The State ex rel. Keiffer Bros. vs. *Judge, etc.*, 89.

INJUNCTION—*Continued.*

After once granting an order of injunction, the Judge cannot revoke it without notice to, and hearing of the party in whose favor it was granted.

Mrs. M. A. Pike et al. vs. *Bates, Sheriff, et als.*, 391.

Where a party applies for an injunction, accompanying his application with the required bond, or presenting one of the exceptional cases wherein a bond is dispensed with, the Judge should, without further requirement, grant or refuse the injunction. There is no authority for the issuance of a rule and taking testimony, touching the merits of the application.

When, however, such a rule was issued, and upon its trial was discharged, and the case was put at issue by an action and proceeded regularly to the trial, and the demand of plaintiff, on which she based her application for an injunction, was rejected on devolutive appeal taken from such final judgment, this Court, if it finds that this judgment on the merits was correctly rendered, will not remand the case, and grant the preliminary injunction, with the certainty that, after being allowed, it must be dissolved, and particularly where it is shown that the property, the sale of which was sought to be enjoined, had been sold under the execution, and was thus beyond the reach of the remedial process.

Mrs. Sinnot vs. *Rochereau & Co.*, 784.

INSOLVENCY.

Under Section 1871 of the Revised Statutes, the Judge cannot, upon the mere filing of the creditor's petition for a forced surrender, issue an order to compel the defendant to make the surrender. A suspensive appeal lies from such an order.

Reder & Co. vs. *Mrs. Maas et al.*, 130.

Where an insolvent has made a surrender under our State laws, which has been accepted, and a syndic has been appointed by the creditors who have participated in all the insolvent proceedings, they are not estopped from opposing debts placed on the schedule, nor from suing to bring into the estate property alleged to have been fraudulently disposed of by the insolvent.

Chaffe, Syndic, vs. *Mrs. Scheen*, 684.

An extra judicial surrender of his property made by a debtor to, and accepted on his conditions by, a portion of his creditors, does not transfer the ownership of his property to such creditors, nor does it divest his other creditors of the right to participate *pro rata* in the proceeds of the sale of such property, made by judicial process at the instance of the creditors who had formally accepted the surrender and conditions of the debtor.

INSOLVENCY—*Continued.*

The title of any creditor to a judgment against the debtor, and who claims his share of the assets, cannot be inquired into collaterally, without making the alleged owner a party to the suit.

T. W. Bothick vs. *Greves et als.*, 907.

In a contest between the creditors of an insolvent debtor, in the settlement of his succession, notes and mortgages given by him whilst in insolvent circumstances do not make conclusive proof of their own reality and validity, if assailed.

Succession of M. Coughlin, 916.

The clerk of a District Court has no power, in the absence of the Judge, to make a decree accepting the cession of an insolvent debtor for the benefit of his creditors, and staying proceedings against his person and property. It is a judicial act, equivalent to a judgment—which can be exercised by the Judge only. The Constitution did not authorize the legislature to confer on such clerks the power of rendering judgments, and the legislature has not done so.

The State ex rel. Boyd vs. *Clerk, etc.*, 1027.

An order by the Judge of one division of the Civil District Court for the Parish of Orleans, transferring a cause to another division to be there cumulated with the insolvency proceedings of the defendant, is a compliance with Sec. 1816 of the Revised Statutes, which we hold not to be inconsistent with Art. 130 of the present Constitution.

Such an order is not appealable.

Bajourin vs. *Ramelli*, 1216.

Section 1799 of the Revised Statutes, providing that in deliberations of creditors in insolvency proceedings, "the opinion of the majority of the creditors in number and amount shall prevail; but in case of any equality, then the number of persons shall prevail," requires unequivocally a majority of creditors, both in number and amount, in order to choose a syndic, and cannot be construed away.

The term "equality" in the last phrase refers to equality *in amount*, in which case only can the majority in number elect.

Winkler & Ricks vs. *Creditors*, 1221.

INSURANCE.

The receipt of the Insurance Company for the plaintiff's draft, furnished for the first annual premium, which is alleged to evidence a contract of insurance between the parties, constituted no such contract. Verbal evidence was admissible to show that said receipt was no contract.

INSURANCE—*Continued.*

The agent of the Insurance Company could not bind his principal in the premises without special authority.

Mrs. M. H. Todd vs. *Piedmont and Arlington Ins. Co.*, 63.

Where a loss has been adjusted between an insurance company and a policy holder, such adjustment is a new and independent agreement; and the action for the recovery of the adjusted loss is a suit, not upon the policy, but upon the new promise or contract. In such a suit, the company cannot set up, in defense to the claim, breaches of warranties or stipulations in the original policy.

The Company can escape the liability of the adjusted loss only in a clear case of fraud or error, in which the burden of proof lies upon them, and they must establish the charge with certainty.

L. Godchaux vs. *Merchants' Ins. Co.*, 235.

This is a suit on a policy of insurance for the destruction of the insured building. The policy contained a clause under which the insurer was not responsible for losses occasioned by explosion. And the defense was that the losses were due to that cause. By the explosion of the sugar house boilers, the building caught fire, which fire was apparently extinguished, but it broke out a second, and a third time, within forty-eight hours after the explosion.

Held, that the existence of a fire as an effect of the explosion must be presumed to have continued as such an effect, unless the contrary be proven, and the insurer was released from liability for the destruction of the building.

E. Tanneret vs. *Merchants' Ins. Co.*, 249.

Where a plaintiff sues to recover against the loss of a stock of furniture insured and destroyed by fire, and alleges that the furniture was in a warehouse in the rear of the building, at the corner, instead of alleging that the same was in said building, the misdescription cannot relieve the company when it is proved that the policy had been destroyed; that the insured had no other transaction with the company; that the building contained a warehouse up and down, and when evidence was freely introduced showing the intent of the parties, and establishing that the entire building, which was two-story, was covered in its length and width by a continuous roof extending over a yard and the rear warehouse.

O. Allen vs. *Lafayette Ins. Co.*, 763.

To invalidate a claim on a policy of insurance, false swearing in proofs of loss must be wilful and intended, or calculated to defraud.

Damage by fire includes not only loss by actual ignition, but all losses necessarily following from the occurrence of fire and arising directly and immediately from that peril.

INSURANCE—*Continued.*

Whether removal of goods was necessary is to be judged, not by the actual result, but by the circumstances of the case as they appeared to parties acting at the time.

A. Balestracci vs. *Firemen's Ins. Co.*, 844.

Where a *prima facie* case is made out, and the insurance company has set up breach of warranty and intemperance, the burden rests upon it to make out the defense. Where it fails in that regard, the beneficiary will recover.

Mrs. Boisblanc vs. *Insurance Co.*, 1167.

INTEREST.

A contract to pay eight per cent. interest and two per cent. commissions on money advanced, is usurious, and under the Revised Statutes, which do not conflict with the Code, the entire interest is forfeited.

Succession of A. C. Rhoton, 893.

JUDGMENT.

A judgment previously rendered, in execution of which a *fiera facias* has issued, cannot be afterwards set aside by an *ex parte* order with a hearing, or notice to the party in interest.

J. A. Bajourin vs. *Ramelli*, 554.

None but parties to a suit are entitled to service of notice of judgment.

Notice of judgment, rendered *ex parte*, placing heirs in possession of succession property, need not be served on the executors of the succession, whose right to a suspensive appeal is lost after the expiration of the legal delay.

The validity of this *ex parte* judgment, which may be null and void, cannot be questioned in this proceeding; an appeal being the proper method to review such judgment.

A rule for a restraining order, which was never sustained, cannot suspend a judgment.

A writ of prohibition issues only to inferior courts, and not to private individuals, unless they are necessary adjuncts to the proceeding against the Judge.

The State ex rel. Zimmerman vs. *Judge, etc.*, 653.

Where it appears that a judgment was rendered after answer, and was subsequently acquiesced in by the defendant, by payment of interest and promise to pay such, and the party against whom it was rendered was present in the parish and yet suffered it to be executed without opposing its execution by suit, such party is considered as estopped and cannot attack the judgment, or what was legally done under it.

Cane vs. *Sewall et al.*, 1096.

JUDGMENT—*Continued.*

A judgment cannot properly be rendered for more than is demanded. The burden of proof is on the opponent when he alleges assets beyond those acknowledged in the account.

Succession of Claverie, 1122.

Where a judgment recites, upon its face, the consent of the defendant "given in open court," citation and default are unnecessary; the consent so given need not be in writing; and the fact and sufficiency of the consent will be presumed, unless the contrary be made to appear. 29 An. 557; 11 An. 280.

Mrs. Thornhill vs. *State Bank*, 1171.

JUDICIAL SALES.

Where the attorney, himself a party to the suit, acts as the appraiser for said party, the sale cannot be attacked on the ground that he was not sworn.

Where an order of sale specifies no terms of credit, but only requires the purchaser to assume the payment of certain mortgage notes already *past due*, the sheriff did not depart from the terms fixed in the order, by advertising and selling for cash, at least in absence of any showing that the notes had been extended.

A. J. Keenan vs. *Heirs of Ahern*, 885.

JURISDICTION.

In an action for the ejectment of a tenant, the amount of the unpaid rent, as stipulated in the lease, exceeding the sum of $1,000, the Supreme Court has jurisdiction.

William J. Beirne vs. *James Gill*, 7.

Plaintiff's judgments against the municipal corporation (for the payment of which he seeks the levy of a tax,) exceeding, *with the interest*, the sum of $1,000, the Supreme Court has jurisdiction of the matter in dispute.

The State ex rel. Fisk vs. *Police Jury, etc.*, 95.

The Supreme Court has jurisdiction of suit for the levy of a tax to pay three judgments owned by plaintiff, although the amount of each judgment is less than one thousand dollars, if the aggregate amount of the judgments exceeds one thousand dollars.

In such a suit, the right to the levy of the tax prayed for is an issue presented for decision, and the proceeding is not an ordinary execution of a judgment, or of judgments, which are *res judicatæ* of the issues involved in the original suit or suits only, and the right of appeal cannot be defeated by such consideration.

H. Tebbe et al. vs. *Police Jury, etc.*, 137.

The Fifth District Court for the Parish of Orleans had jurisdiction under Acts 859 of 158 and 175 of 1859, regulating the collection by

JURISDICTION—*Continued.*

judicial process of taxes due the City of New Orleans, over all amounts, even less than fifty dollars.

Mrs. Roberts, etc. vs. *F. A. Zansler*, 205.

The allegation in defendant's answer and claim in reconvention, that the value of the possession of the land sued for is $1,500, is sufficient to show that the Supreme Court has jurisdiction of the case.

Mrs. C. Young vs. *R. Wilson et als.*, 385.

It is the value of the thing claimed, and not the amount of the judgment sought to be satisfied out of it, which determinates the jurisdiction of the Supreme Court, when title is asserted to the property. There being no allegation, no affidavit, no testimony to show the value of the property in this case, the appeal is dismissed.

T. B. Rhodes vs. *C. E. Black et al.*, 406.

Where there was a judgment in the lower court homologating an account of administration, so far as not opposed, which judgment had become final, and where the *only* opposition to the account was a claim for $237.60 for drainage tax, the Supreme Court has no jurisdiction to determine the merits of the controversy, because the amount to be distributed is no longer an appealable bond.

Succession of Duran, 585.

The Supreme Court is without jurisdiction to entertain a suit to annul a tax sale, at the instance of a person seeking to enforce an hypothecary action against the property sold, where the amount of the mortgage claim is only $350 and interest.

E. Fendler vs. *Bates, Sheriff, et al.*, 595.

This application being for a writ of prohibition only, no other question than that of jurisdiction of the Court, or incompetency of the Judge, can be raised.

As no plea to the jurisdiction appears in the pleadings, or was passed upon by the lower court, there is nothing before the Supreme Court to determine.

The State ex rel. Attorney General vs. *Judge etc.*, 611.

When one has been subrogated by the plaintiff in a pending suit to his right of action therein, and has had the subrogation entered upon the minutes of the court where the suit is pending, but before notice of the same is served on the debtor of the right, it is seized under a judgment rendered against the original plaintiff, in a parish other than where the right is being prosecuted, and is advertised for sale, the party claiming under his transfer and subrogation, can enjoin the sale and assert his claim before a court of the parish where the seizure is made, and can allege and prove that the judg-

JURISDICTION—*Continued.*

ment is a nullity, because a pure simulation, rendered on a false confession and for no consideration.

In such case he is not bound to bring an action of nullity before the court that rendered the judgment, and not bound to cite the defendant in the pretended judgment. Such an action is not like the action of nullity, which must be brought by a party to the judgment, but more in the nature of a revocatory action.

W. H. Jack vs. *Harrison, Jr. & Co.*, 736.

A District Court which has jurisdiction of a cause, is competent to pass upon and decide all legal points and issues presented in a reconventional demand, and in all other incidental demands growing out of or connected with the main suit.

In such a case, the charge that the Judge has usurped authority in deciding pleas or issues alleged to be beyond his jurisdiction, will not entitle the party complaining to a writ of prohibition from the appellate tribunal, unless the record discloses a plain usurpation of authority or jurisdiction, or arbitrary exercise of power by the inferior court.

The State ex rel. Gullet Gin Co. vs. *Judge, etc.*, 758.

By Act No. 5 of 1870, extra session, no court within this State has the jurisdiction to entertain an application for or the power to grant a writ of mandamus for the purpose of compelling the auditing officer of the City of New Orleans to issue a warrant for the payment of money on the disbursing officer of said city. A writ of prohibition will issue from the Supreme Court, under its supervisory control, to restrain the enforcement of a writ of mandamus issued in such circumstances by an inferior court.

The State ex rel. Fernandez vs. *Judge, etc.*, 875.

In an action by one partner against the other, for an account of partnership funds received and unaccounted for by the latter, if the plaintiff alleges that the sum thus received amounts to only a thousand dollars, the case presents an issue over which the Supreme Court has no jurisdiction, and the appeal will be dismissed.

C. H. Teal vs. *T. J. Pirtle*, 892.

The Supreme Court is without jurisdiction, when the suit is to enforce a mortgage for $400 and interest against a third possessor, though the land subject to the mortgage may be worth more than one thousand dollars.

Endom vs. *J. T. Ludeling*, 1024.

In a contest over a fund in the hands of a sheriff, realized under execution, the Circuit Courts have no jurisdiction if the demand of plaintiff exceeded one thousand dollars, although the amount

JURISDICTION—*Continued.*

claimed on intervention or third opposition be less than one thousand dollars.

In such cases, the jurisdiction of the appellate tribunal must be tested by the amount claimed by plaintiff, and not by the claim of third opponent or intervenor. 31 An. 452; 30 An. 625; 8 La. 164.

The State ex rel. Seymour vs. *Judge, etc.*, 1046.

The third opponent claiming $1,000 out of a larger fund to be distributed by the executor, this Court has jurisdiction.

H. Renshaw vs. *Stafford, Executor*, 1138.

When the prayer of the petition contains no moneyed demand whatever, and the plaintiff asks that his right to sue for damages hereafter be reserved, the Supreme Court is without jurisdiction of the suit.

J. M. Saux vs. *Patton, Mayor, etc.*, 1155.

JURY.

The remarks which the jury read by permission of the court, after their verdict was rendered and filed, did not affect the validity of the verdict.

H. M. Wallis vs. *B. F. Bazet*, 131.

Although a case has already been fixed for trial, an application for a jury is in time if, at the moment it is made, the case does not stand fixed for trial.

Gallagher et al. vs. *Hebrew Congregation*, 526.

Where a suit is on unconditional obligations to pay specific sums of money, and the defendant does not bring himself within either of the exceptions provided by C. P. 494, the District Judge has no right to order a trial by jury, and must pass upon the case itself.

The State ex rel. Chism & Boyd vs. *Judge, etc.*, 1177.

JUSTICES OF THE PEACE.

Under the provisions of the Constitution of 1879, justices of the peace have no authority to act as examining and committing magistrates in cases of capital punishment or hard labor. Such authority is vested, in those cases, in the District Courts alone.

The State ex rel. Stevens et al. vs *Livaudais, Judge, etc.*, 52.

A City Court Judge has jurisdiction to annul, not only the judgments rendered by him, but also those rendered by the justice of the peace whom he has replaced. 32 An. 1222; 33 An. 15, 146.

The State ex rel. Harman vs. *Voorhies, etc.*, 99.

A person cannot be arrested under a warrant issued by a justice of the peace charging him with violating an ordinance of the Police Jury of the Parish of Jefferson, relative to juries, and sentenced to fine, and in default of payment, to imprisonment by such justice.

JUSTICES OF THE PEACE—*Continued.*

He cannot be thus summarily punished. Neither the law organizing the parish, nor the general laws of the State authorize such a proceeding. A party, for such an offense, can only be proceeded against by information or indictment, or civil suit, provided in the statute.

Police Jury, etc. vs. *Arleans*, 646.

LAWS.

In case of ambiguity in the English text of an Act of the legislature, the French text may be consulted and serve to explain the ambiguity.

Parish of Lafourche vs. *Parish of Terrebonne*, 1230.

LEASE.

The term "under-tenant," as used in C. C. 2706, is synonymous with "under-lessee."

Without a price fixed by the parties or left to the award of a third person named or determined, there can be no lease.

The goods of a third person contained in the leased house by his consent, under an agreement with the lessee, that no rent or other consideration was to be paid for the occupancy, are not the goods of an "under-tenant," and are affected by the landlord's pledge.

University Publishing Co. vs. *Mrs. Piffet et al.*, 602.

Where the parties claim to have leased certain premises from different agents of the owner for the same period of time, it is incumbent on the one who pretends to hold the lease first made to prove that the agent whom he dealt with had authority to lease for the term that he did lease; that the lease was duly recorded, possibly even if the other party had knowledge of the lease, and acted fraudulently with the owner or his representative.

A. Weil vs. *A. A. Zodiag*, 982.

A joint proprietor is not liable to his co-owner for rent, on account of the occupancy of the land, in the absence of any contract of lease, and where such proprietor cultivates not more than his interest of the land, without objection from the other co-owner. But such co-owner is not liable for improvements made by the other proprietor, except such as are necessary for repairs or the preservation of the property. 23 An. 150; 33 An. 297.

P. H. Toler vs. *Mrs. Bunch*, 997.

The lessor who takes a provisional seizure before the rent is due, when he acts without malice and in the honest belief or fear that the lessee will remove his property from the leased premises, does not thereby render himself liable in damages, even if the lessee did not have any fraudulent intent of saving his property from the lessor's privilege for rent.

J. J. Dillon vs. *Porier*, 1100.

LEASE—*Continued.*

When, in an ejectment suit before a court of limited jurisdiction, the defendant alleges a lease for an amount beyond such jurisdiction, the court is not, on the mere allegation, bound to dismiss the suit. It has a right to inquire into the correctness of the averment. It is only where such lease is found to exist, that the court will desist from the case and dismiss it.

A prohibition does not lie in such a case to prevent the court from ascertaining whether the defense to the jurisdiction is, *in point of fact*, well founded or not.

The State ex rel. Rothang vs. *Judge, etc.*, 1142.

LIBEL.

The publication made by the defendant, of the proceedings of the Council of the Town of Houma, was not libellous.

T. M. Wallis vs. *B. F. Bazet*, 131.

By our Bill of Rights, the "press" is free from all censorship over what shall be published, and entirely exempt from control, *in advance*, as to what shall appear in print.

Courts in this State are therefore absolutely without authority to control in advance or to restrain by injunction, the liberty enjoyed by the "press" to publish what even may be of a libellous nature, the party injured having his remedy *after* the publication.

The Court having no power to grant such an injunction, it was an absolute nullity, and the condemnation of defendants for contempt falls with the injunction, the moment such nullity has been pronounced by this Court, which has supervisory jurisdiction in cases like the one at bar.

The State ex rel. Liversey et al. vs. *Judge, etc.*, 741.

In an action for damages for defamation, malice is the essence of slander, and it must be proved, either by direct testimony or by implication flowing clearly from the language and conduct of the defendant.

Hence, damages cannot be recovered against a party who informs against an employee of a railroad company, of conduct injurious to the company, of which the informant's wife is a stockholder.

Aleas Haney vs. *H. Trost*, 1146.

MANDAMUS.

A mandamus to compel the levy of a tax to pay a judgment against a municipal corporation, cannot be assimilated to an execution under a final judgment, from which no appeal lies.

The Relator was appointed, by the District Judge, Parish Attorney, in the absence of an appointment by the Police Jury. He seeks, by mandamus, to compel the levy of a tax beyond the constitutional

MANDAMUS—*Continued.*

limitation, to pay his judgment against the municipal corporation, for his fees, on the ground that there was a contract between him and the Police Jury, resulting from his appointment, and that such contract is shielded by the Federal Constitution from impairment by State legislation.

Held, that there was no contract in the appointment by the Judge, and hence, that the Relator is not entitled to the levy of the tax prayed for.

The State ex rel. J. Fisk vs. *Police Jury of Jefferson*, 41.

This is a suit by the holder of certain bonds of the City of New Orleans, issued under Act No. 49 of 1869, to compel by mandamus the said City to pay the interest due on those bonds in 1881, out of the revenues of that year. *Held*, that the revenues of that year being already absorbed by the expenditures, as shown by the budget, the Relator is not entitled to the mandamus.

The writ of mandamus should not be granted in cases where, if issued, it would prove unavailing.

The mandamus, if granted, could not be executed by the levy of an additional tax, because the Relator has not asked for the levy of such additional tax.

The State ex rel. Samory vs. *New Orleans*, 469.

Difference of this case and that of Henry Samory vs. the same defendant, recently reported.

By the terms of Section 5 of Act No. 49 of 1869, it is made the duty of the City of New Orleans to appropriate annually out of its revenues a sum sufficient to pay the annual interest on the bonds issued by virtue of said law.

The only remedy which the holders of such bonds in 1869 had to compel the performance of such duty, was by the writ of mandamus. Act No. 5 of 1870 could not, therefore, constitutionally destroy this remedial right of the bondholders without creating an adequate mode of relief.

The writ of mandamus can issue to compel the levy of a tax, without judgment previously obtained.

The Relator is entitled to the mandamus prayed for, to compel the City to levy and collect such tax as may be necessary to satisfy his demand; this decree, however, not to compel the levy of the tax in future years.

The State ex rel. DeLeon vs. *New Orleans*, 477.

A mandamus does not lie to compel Judges to reverse their judgments, and render specific judgments in place thereof. It would be substituting the judgment of the appellate court to theirs, in an unauthorized proceeding.

The State ex rel. Cupples vs. *Judges, etc.*, 1016.

MANDAMUS—*Continued.*

A mandamus will not issue to compel the Judges of the Civil District Court of the Parish of Orleans to approve the salary now due of one of their officers, for a particular amount, when their refusal to thus approve is predicated on an act of the legislature reducing such salary twenty per cent.

The Judges could be compelled by mandamus to act on such an application; but not to act in a particular manner. To do so would be to divest them of their judicial discretion.

The State ex rel. Luminais vs. *Judges, etc.*, 1114.

A mandamus lies to compel the trial of a case, where the Judge has illegally refused to go into the merits of the action upon an erroneous construction of some question of practice preliminary to the whole case.

The State ex rel. Chism & Boyd vs. *Judge, etc.*, 1177.

A mandamus lies to compel a municipal officer, clothed with judicial powers, to grant an appeal from a judgment imposing a fine under the provisions of a municipal ordinance charged with unconstitutionality.

The defense, that the party fined and imprisoned for non-payment of the fine, was released on *habeas corpus* by the District Judge, owing to the unconstitutionality of the ordinance, is no reason why the appeal should not be granted to the party by the magistrate.

The State ex rel. Cremonini vs. *Mayor, etc.*, 1197.

MARRIAGE.

The marriage of slaves, with their masters' consent, though without civil effects during the slavery of either party, yet when ratified by continued cohabitation of the parties, after the emancipation of both, produces all civil effects *ab initio*, including the community of acquets and gains.

F. H. Ross vs. *C. Ross*, 860.

MARRIED WOMEN.

It is not necessary in tax cases to make the husband a party to the suit or to notify him of the proceedings in it. A married woman can be sued and stand alone in court in such cases.

Mrs. Roberts, etc. vs. *Zansler*, 205.

No act of the wife, done to confirm or ratify her obligations contracted under the marital influence, can bind her, unless done after the dissolution of the marriage.

C. Gillespie vs. *Twitchell, et als.*, 288.

In the absence of proof in the record that defendant was a public merchant, and that the obligation sued upon was for account of her business as such, she cannot be held liable on said obligation, being a married woman.

S. Friedlander vs. *Mrs. Schmalinski*, 528.

MARRIED WOMEN—*Continued.*

Where a party buys property from a married woman, he cannot, when sued by her to annul the contract, set up that the property never belonged to her, but to the community existing between her and her husband at the time of the purchase.

A married woman is not estopped by her declarations in the act of sale or conveyance, from seeking to annul it, on the ground that the act in question was an attempt to take her paraphernal property to pay or secure the debts of her husband. The principle, as usually recognized and enforced, is not applicable to a married woman, when assailing acts charged to be in contravention of the law prohibiting a wife from binding herself or her property to pay the debts of her husband.

When a married woman, not separated in property, signs an obligation with her husband and other parties for a debt for which they are bound *in solido*, but which has not enured to her separate benefit, she is not liable therefor.

Z. Harang vs. *J. A. Blanc*, 632.

The note and mortgage both show that they were executed by a married woman, without any apparent authorization by the Judge, and that the debt secured by the act was for a *past* indebtedness of the wife; this was sufficient to put any third party on his guard and open the door to investigation.

The debt contracted by the wife in this case is shown to have been a debt of the husband, the mortgage and sale of plaintiff's property in execution thereof are both nullities.

K. G. Stapleton vs. *Butterfield et al.*, 822.

Where a sale is made on credit to a married woman, of real estate, for a price exceeding twice the value of the property, and it is not shown that she administered her separate estate, and had means to invest, ample enough to enable her to make the purchase with a reasonable prospect of paying the price, the purchase must be considered a speculation and made for the benefit of the community, and the pecuniary liability for the debt cannot be fastened upon her. Where, in such a case, the payment of the purchase price was secured by mortgage on property of a like value, owned by the wife, the mortgage is a nullity, because given in contravention of a prohibitory law to secure a debt for which the husband or the community is responsible.

Forbes, Executor, vs. *Mrs. M. T. Layton*, 975.

Where wholesale dealers sell to a married woman, separated in property and transacting business as a public merchant, goods appropriate to her trade, upon the orders of herself or of her husband acting

MARRIED WOMEN—*Continued.*

as her agent under express written procuration, they are not bound to follow the goods and see that they are actually used in the business of the wife.

In a suit against a married woman, where both she and her husband are cited, and default is taken against both, although she alone afterwards appeared and answered, the authorization of her husband will be presumed.

Zuberbier & Behan vs. *Prudhomme*, 1048.

The legal representatives of a deceased married woman have the right to urge the nullity of judgments rendered against her for the enforcement of contracts entered into by her during coverture.

A married woman will not be estopped or precluded, under Art. 612, C. P., from demanding the nullity of a judgment, because she did not oppose the execution of the same, if such execution issued during the marriage, while she was not yet *sui juris*.

A purchase made exclusively on credit by a married woman, who is not shown to have been separate in property from her husband, or to have separate property yielding paraphernal revenue, of which she has retained the administration, will be held as a purchase by the community, for which the wife was prohibited from binding herself or her property.

A judgment rendered against her on promissory notes executed by her for such purchase price cannot be enforced, if resisted.

Succession of Susan E. Andrus, 1063.

A married woman, with the authority of her husband, has power to make a compromise. 26 An. 289.

A married woman, authorized by her husband, may mortgage her separate property for her separate debt, without prior examination by a Judge and compliance with other requisites of Revised Statutes, Secs. 2432. *et seq.;* 15 An. 54.

Where the effect of a compromise and of judicial proceedings in execution thereof consented by a married woman, authorized by her husband, is merely to subject her separate property to the payment of her separate debt, she will be held bound thereby.

Where a married woman, after being examined by the judge apart from her husband, admits in open court that the claim sued on enured to her separate benefit, she will not be permitted thereafter to contradict such admission as a ground for attacking the judgment.

Where a compromise and judgment, such as above indicated, have been voluntarily executed by the woman after her widowhood, they will be thereby conclusively ratified.

Mrs. Thornhill vs. *State Bank*, 1171.

MARRIED WOMEN—*Continued.*

A married woman was authorized by the judge to effect a loan of money and to make her note therefor, and secure it by a mortgage upon her separate property. The note and mortgage were executed, the husband appearing before the notary with his wife and joining in the act and authorizing her. Executory process having been sued out thereon, *held*, that no other authorization, either by the judge or the husband was needed to empower her to resist that process by injunction.

A. Dobard, Wife, vs. *Sheriff et al.*, 1193.

MINORS.

A minor heir, on reaching his majority, bringing suit against his tutor for an account, and against third persons by the hypothecary action, to subject the property of the latter to his legal mortgage, needs not make his minor co-heirs parties to his proceedings.

Nor is it necessary, as a condition precedent to such hypothecary action, that the tutor's account be first advertised and homologated, contradictorily with creditors and other parties concerned.

The legal mortgage of the minor on the property of his natural tutor affects all the immovable property of the latter from the day of his appointment, even the property which he sold before the rights of the minor against him had arisen into existence.

B. S. Skipwith and Husband et al. vs. *J. W. Glathary*, 28.

No person but a resident in the Parish can be appointed by the Judge dative tutor to a minor, without giving bond.

Succession of T. W. Foley, 129.

The father and natural tutor of a minor child having for several years cultivated a plantation which was the common property of himself and ward, will be charged with the yearly rent of an undivided half of the plantation and legal interest on said rent. It cannot be held that the cultivation of the property was for the common use and benefit of the tutor and minor child, and that the latter should be charged with the losses of such cultivation.

Art. 1100, C. C., which inflicts penalties on parties who take unauthorized possession of vacant estates, does not apply to the surviving spouse who takes possession of the community property.

Succession of J. Trosclair, 326.

A minor heir, on arriving at his majority, cannot, by appeal, obtain the reversal of a judgment rendered against the succession of his father, and which the executor of that succession allowed to become final by not appealing.

J. H. West vs. *P. E. Davis et al.*, 357.

The tutor's receipt, by authentic act, for money due his wards, cannot be contradicted by oral evidence.

MINORS—*Continued.*

No law compels the tutor to consult a family meeting or to obtain the authorization of the Judge, for the purpose of investing the minor's funds on mortgage, in accordance with the provisions of the Code.

L. Mather et al. vs. *Knox et al.*, 410.

Nothing in the record showing the amount of the indebtedness of the former tutor to his ward, the order of seizure and sale issued by the lower court, to foreclose the special mortgage given by said tutor, was granted upon insufficient evidence and must be set aside.

Such special mortgage given by the tutor does not import a confession of judgment for any specific amount.

Ritter, Dative Tutor, vs. *Succession of Faessel*, 416.

Where a tutor gives a special mortgage in lieu of a general one, and his final account shows an indebtedness to the minors greater than the amount of such mortgage, as against a party holding a subsequent mortgage on the same property, the minors are protected only to the amount stipulated in the act.

Such a special mortgage does not cover or include interest, although the act may so declare, as the law which authorizes such mortgages, requires that the sum mentioned in the act must include both the principal and any interest which may probably accrue.

Though the minors may collect a part of their claim against their tutor by judgment or otherwise, prior to a final settlement, the sum so collected cannot be imputed as a credit on the amount fixed in the act of mortgage and deducted therefrom. If the tutor's indebtedness to them still equals the amount of the mortgage, the whole of it can be collected by preference.

The ordinary rules applicable to the interpretation of payments between creditor and debtor do not apply to the instant case.

Succession of H. Kuntz, 852.

The appointment of a curator to represent minors, is not vitiated by improperly styling him "curator *ad hoc* and special tutor."

A. J. Keenan vs. *Heirs of Ahern*, 885.

The special mortgage authorized to be given by the natural tutor in lieu of a general mortgage of the minors on all his property, must be executed by the tutor on his own property, and cannot be given by a third person for him.

Succession of Anna B. Nusbaum, 900.

In an hypothecary action by a minor, it is essential that his rights be previously liquidated by a judgment. On the trial of such a

MINORS—*Continued.*

case, a copy of the judgment, unaccompanied by the proceedings in the case in which rendered, is inadmissible.

In the absence of such proof plaintiff cannot recover.

Mayo vs. *Brittan et als.*, 984.

An inscription of a minor's mortgage preserves the mortgage during the tutorship, though it should continue for more than ten years; but if not re-inscribed in ten years after its termination, the mortgage will perempt. Nor does it matter if the mortgage is evidenced by a judgment recognizing it, and fixing its amount. Art. 3369, C. C. construed.

Lemelle et al. vs. *J. M. Thompson*, 1041.

Where a defendant dies *pendente lite*, in absence of administration, suit is properly revived and continued by making the heirs parties, and if the heirs are minors and have no qualified tutor, they may be made parties through a curator *ad hoc* duly appointed to represent them.

In such case, citation *eo nomine* to the curator is not essential. Service of the petition for, and order of, appointment specifying the object and purpose thereof is sufficient, especially when the suit proceeds without objection, contradictorily with attorneys presumed to be authorized to represent him.

Zuberbier & Behan vs. *Prudhomme*, 1048.

Debts from a tutor individually to himself in his fiduciary capacity, when they become due and exigible during the term of the tutorship, are considered as collected by him and are secured by the legal mortgage on all his immovables, resulting from his tutorship and proper inscription.

Succession of Drauzin Triche, 1148.

MORTGAGE.

It is only where privileges or prior *special* mortgages are recorded against an estate that the purchaser can retain in his hands the portion of the price necessary to discharge said prior special mortgage or privilege.

The purchaser in this case had no right, under a prior *general* mortgage, to retain a portion of the purchase price to satisfy it; his remedy was to claim the proceeds in the sheriff's hands, by third opposition, or subsequently to bring an hypothecary action.

What the respective rights of the parties may be, we in nowise determine.

L. Godchaux vs. *Succession of Dichary*, 579.

Where the property of a deceased, incumbered with mortgages, is seized and sold to pay the debt, and realizes much more than the

MORTGAGE—*Continued.*

claim of the seizing creditor, but not enough to pay him, together with anterior, concurrent and subsequent mortgages or incumbrances, and the whole price of adjudication is not paid in court, but is retained by the adjudicatee, the executors have no right to ask that the entire price of sale be paid to them, for distribution in the succession, by an account, on the ground that the estate is insolvent and the claims are conflicting.

The purchaser of such property has a right to clear it from incumbrances, by an injunction against all concerned in them, upon payment of the proceeds under a final judgment adjusting their rights and ranks.

A proceeding termed an intervention, for which the effect of an interpleader is claimed, is irregular.

The court is without authority to order the price of adjudication to be deposited in a named bank, and the notification of the petition to all concerned, by advertisement or publication during a stated time in a designated newspaper. The proceedings must be carried on by citation, actually or constructively served.

J. C. Morris vs. *Cain's Executors*, 657.

Where two separate notes secured by the same mortgage are drawn in favor of different individuals, either mortgagee may sue to enforce his mortgage rights without a joinder of the other.

Utz vs. *Utz et al.*, 752.

This is an hypothecary action to enforce the payment of liquidated debts, alleged to be secured by a judicial mortgage.

When a railroad corporation is authorized to mortgage, for stated purposes, its road, *completed or not*, a mortgage given to secure bonds issued for those objects and recorded, will attach to property subsequently acquired, as effectually as if it had been described specifically in the act; it being entitled to the same effect as if it were a legal or judicial mortgage, when duly recorded.

The prohibitions against mortgaging future property, found in the Civil Code, relate to ordinary transactions between individuals, and do not apply to railroad corporations, which are by their charters, and by general legislation concerning such companies, authorized to mortgage, for construction and repair purposes, their road, completed or not, therefore, their actual and future property.

In case of failure to pay, the United States Circuit Court in equity has jurisdiction at the instance of creditors, and the property is in *custodia legis* from the time of the taking of possession by a receiver. At the date of registry of plaintiff's judgments, the real estate of

MORTGAGE—*Continued.*

the railroad was in the custody of the Circuit Court, a receiver having been appointed.

Such a proceeding is likened to one *in rem*, binding on all who are or could have been made parties thereto.

Judgments recorded after such mortgage has been given and recorded, and after such jurisdiction has vested, do not give rise to a judicial mortgage.

The property, acquired subsequently to the mortgage, and sold under the order of the court, (the price having been paid and distributed under its authority, and the proceeds being insufficient to pay the mortgage debt) passes free from all incumbrance apparently resulting from the registry of the judgments, and the plaintiff in the hypothecary action must fail.

Jesse K. Bell vs. *Railroad Company*, 785.

Where a planter gives a special mortgage on his plantation to cover and secure future advances, and the mortgagee, after advancing part of the amount stipulated in the act, becomes a member of a commission house, a partnership by whom other advances are made during the year, and to whom the crop is consigned for sale, and by whom sold, and an account current is rendered by this firm, in which all the sums advanced under the mortgage are charged both before and after the formation of the partnership, and with the consent of the mortgagee, the mortgagee cannot, after this, proceed alone to enforce the mortgage by seizure and sale, regardless of the credits that may be imputable to the debt from the proceeds of the crop.

No settlement of the debt can be made in a proceeding to which the mortgagee and planter are alone parties. The firm should also be parties to the suit.

C. A. Phillippi vs. *Clairteaux et al.*, 796.

An Act passed in this State, purporting on its face to be a trust conveyance or deed of trust in fee simple, will not be given the effect of an act of mortgage binding on third parties, although recorded in the proper mortgage book, and although it might be considered between the parties as intended by them to secure the payment of a debt as therein mentioned.

Parties contracting in this State are required in all their transactions affecting real estate here, to comply with the forms prescribed by the local law and customs, and to announce clearly the purpose of the Act. Reasonable doubt as to the true character of the Act will protect effectually third parties from its operation.

J. N. Thibodaux vs. *Anderson*, 797.

MORTGAGE—*Continued.*

Sales of property made in violation of Act No. 3 of 1878, are not of absolute, but only of relative nullity, and when the holder of a concurrent mortgage buys the mortgaged property at private sale, pending proceeding for the seizure and sale of such property by the other concurrent mortgage creditors, the qualities of creditor and owner become united in said purchaser and his mortgage is extinguished by confusion.

J. S. Copes vs. *Sheriff, etc.*, 1032.

Where property has been sold under an hypothecary proceeding against a third possessor, the party procuring the sale is not entitled to claim the proceeds, in preference to the mortgage creditors of such third possessor, by denying his ownership thereof, where, in the petition for its sale, his title is acknowledged, and if the mortgage of the seizing creditor has perempted, the opposing creditors of the third possessor are entitled to the proceeds.

Lemelle et al. vs. *J. M. Thompson*, 1041.

MUNICIPAL CORPORATIONS.

Under the laws of the State, police juries are clothed with plenary and exclusive power to regulate by ordinances the manner of making and repairing public roads in their respective parishes.

The burden imposed on land owners by the parochial road laws, is not a tax within the meaning of the Constitution, in its limitation of the municipal taxing power.

R. R. Barrow vs. *Hepler et al.*, 362.

The doctrine is now settled that the legislature has the power to authorize the building of a railroad on a street of a city, and may directly exercise this power or devolve it upon the local or municipal authorities.

W. C. Harrison vs. *N. O., Pacific R. R. Co.*, 462.

The authority of Police Juries relative to the protection and preservation of completed levees has not been divested or impaired by the Constitution or any law of this State.

An ordinance passed by a Police Jury imposing a fine of five dollars on persons riding or driving on the public levees, is legal and valid.

Parish St. John the Baptist vs. *Shexnaydre*, 850.

On the division of a public corporation, possessing corporate property, into separate new communities, each becomes entitled to hold in severality the public property which falls within its limits. The rule is different when a new corporation is created, and the old one from which it is taken remains unchanged, preserving its original name.

MUNICIPAL CORPORATIONS—*Continued.*

Property donated to a parish in fee simple, for its use and benefit, and upon which a courthouse was built and used, cannot be legally sold under a Police Jury ordinance, although the parish seat being changed, the building was abandoned and threatened going to ruin. Such sale having been made without the legislative authority, is a nullity, and so conveyed no title. In such a case, the defendants are entitled to a reimbursement of the purchase price, as a condition precedent to the recovery of possession of the land by the plaintiff.

Parish of West Carroll vs. *Mrs. Gaddis et al.*, 928.

NATURAL CHILDREN.

Children conceived by persons who at the time were prohibited from contracting marriage on account of disparity of race, may, after being duly acknowledged, be legitimated and given the right of heirs, by the marriage of their authors, celebrated after the impediment has been removed by law.

A marriage contracted in a Parish different from that of the domicil of the parties, and solemnized by the proper authority there, is not forbidden by law, and will produce all the effects of a legal marriage.

Succession of Colwell, 265.

NEGOTIORUM GESTOR.

A workman, making repairs to a building against the will and directions of the owner, is not entitled to remuneration, and has not the legal rights of a *negotiorum gestor*.

Succession of T. Mulligan vs. *Rev. Kenny*, 50.

NEW ORLEANS.

The power of the City of New Orleans to inflict fine or imprisonment is confined and restricted to transgressions of ordinances under its police power, and cannot be extended to transgressors of ordinances looking to revenue. Re-affirming Municipality vs. Pance, 6 An. 515; and State vs. Manessier, Opinion Book 53, p. 237.

The State vs. *J. Patamia*, 750.

The banks of the river are public, and within her corporate limits the City of New Orleans has the right to control, manage and administer their use for the public convenience and utility. Riparian proprietors have no right, by injunction, to restrain the exercise of this right.

The discretion of the city in determining what are proper and needed facilities for commerce, and on what part of the river banks, within her limits, they should be established, is not a proper question for judicial control or interference.

Watson et al. vs. *Turnbull et al.*, 856.

NOVATION.

The exchange of the notes originally given for the price of an engine and machinery for another note, in which the same consideration is recited, created no novation of the debt.

Bergeron, Administrator, vs. *H. Patin,* 534.

OWNERSHIP.

A possessor of the lands of another, who erects buildings or other works on such lands, is entitled to recover from the owner of the soil the value of his materials and the price of workmanship, if the owner of the soil elects to keep the works. Until such election is made by the owner of the soil, the possessor remains the owner of the works, and owes no rent.

This rule applies to lands which are the separate property of a married woman.

W. G. Kibbe vs. *K. Campbell,* 1163.

PARTITION.

None of the parties having made any objection to the terms of sale fixed by the Court upon the suggestion of the plaintiff in the partition suit, their silence was properly construed by the Court into an assent to such terms, which are, therefore, binding upon all.

J. A. Morris et al. vs. *Lalaurie et als.,* 204.

An agreement between the heirs, that one of them will buy at the partiton sale, for a certain price, some of the joint property, is legitimate and binding, and if the said property is adjudicated for less than the stipulated price to the heir who agreed to buy it, he is liable for the difference.

Ventress, Executrix, vs. *Brown et als.,* 448.

Where a partition in kind cannot conveniently be made, the property should be sold to effect the partition. Property cannot be conveniently divided, where such division would necessitate the cantling of tenements to an injurious extent.

A. Meyer vs. *N. H. Pargoud,* 969.

PARTNERSHIP.

An action lies to recover a disputed claim from one of the partners of a dissolved firm, when it was placed as an indebtedness on the books of the firm, and such partner, by agreement with his co-partner, at the dissolution causes him to assume all the debts and liabilities of the partnership among which the claim figures.

The creditor in such a case, who makes himself party to composition proceedings in bankruptcy by the assuming partner, and grants him a discharge, on certain terms, is concluded and cannot recover from such debtor.

Mrs. Lisso vs. *Navra & Offner et al.,* 1111.

PLEADINGS.

There is no inconsistency in the plaintiff's averments that the sale was simulated and was also a disguised donation to defendant.

Mrs. A. Villars, Wife, etc. vs. *L. Fairre*, 198.

A co-proprietor seeks to establish in this case, not only his right to a partition, but, in order that his own rights and those of his co-proprietors may be judicially recognized, he asks the Court to decide upon the claims of himself and the others who claim an interest in the property, in order to fix the true ownership of his co-proprietors, and thus enable him to obtain a decree which would make valid and binding the proceedings had to effect the partition. In such a case, there is no inconsistency in coupling his demand of a petitory character with that for a partition, and thereby avoiding a multiplicity of suits.

J. A. Morris et al. vs. *Lalaurie et als.*, 204.

The averments in the petition, that the administration of the Succession of W. E. Hall was closed, the final account of the administratrix homologated and the property turned over to the heirs, were sufficient for the institution of this suit.

A tender of the price of sale was not necessary in this case, in which plaintiffs aver they were deprived of their property by a fraudulent conspiracy, and that they received no part of the proceeds of the sale.

This action of nullity was properly brought in the Parish of Red River, which was created after the partition proceedings had taken place, and to which the record of said proceedings was removed from the Parish of De Soto, by law.

C. Gillespie et al. vs. *Twitchell et als.*, 288.

A defendant, whose exception in a suit for separation from bed and board was tried and overruled, during his absence from court, and who subsequently files an answer on the merits, without first moving to rescind the ruling of the Court, and to reinstate his exception, will be considered on appeal, as having waived all objections to the irregularity of the trial of said exception.

C. Terrell vs. *J. R. Boarman*, 301.

Where a suit is brought by an executor, claiming title to the property of an insolvent, as belonging to the succession which he administers, and which is seized by another executor for account of another succession, it is necessary that such first executor prove title in said succession and make the assignee of the insolvent and the heirs of the seizing creditor parties to the action.

Bird, Executor, vs. *Générès et al.*, 321.

PLEADINGS—*Continued.*

The prayer of the petition in this case, notwithstanding its confused averments, shows that the suit is the revocatory action, and it was properly dismissed by the lower court for want of the necessary allegation of the vendor's insolvency.

The plaintiffs were not entitled to amend their petition after it was dismissed as showing no cause of action.

Hart & Co. vs. *Bowie et al.*, 323.

The general denial and special defenses set up by defendant, are not inconsistent and, therefore, evidence was properly admitted in support thereof. Affirming rule in 29 An. 134.

B. T. Young vs. *J. J. Bridges*, 333.

No one can be allowed to question the validity of a sale and, at the same time, to judicially demand the proceeds of such sale.

L. Mather et al. vs. *Knox et al.*, 410.

In an exception as to want of proper parties, it is not necessary to give the names of those who should have been joined. It is sufficient to allege that the parties referred to in the exception were parties to a certain designated suit, the record of which is offered in evidence on trial of exception. A judicial admission by the author of the plaintiff's title, of having transferred the property to other persons than the plaintiff during the period of said author's ownership of the thing, and before the beginning of the plaintiff's claim thereto, is of equal authority to a formal transfer made by such party, to prove an interest in other parties who, it was claimed, should be joined in the suit.

E. De St. Romes vs. *Cotton Press Co.*, 419.

It is inconsistent to ask, in a petition, to be recognized as sole heir, accepting a succession purely and simply, then afterwards, by opposition to the Public Administrator, pray to be appointed administratrix; such opposition and prayer operate as a waiver of the first demand.

Succession of Berfuse, 599.

In a suit to annul a *dation en paiement*, it is not inconsistent to allege that the act is a pure simulation, but if not simulated, that it has been made in fraud of creditors and gives an unfair preference.

Chaffe, Syndic, vs. *Mrs. Scheen*, 684.

The plea of discussion, urged by the third possessor in an hypothecary action to enforce a judicial mortgage, is a dilatory exception, and cannot be pleaded after default, nor in an answer after plea to the merits, and when so pleaded, the same must be disregarded.

Notwithstanding the apparent contradiction in terms between Arts. 333 and 336 of the Revised Code of Practice, the former must pre-

PLEADINGS—*Continued.*

vail, because it evidently embodies the true legislative intent, being the industrious incorporation into the Code of the provision of the Act of 1839; and the omission to qualify the terms of Art. 336, in accordance therewith, was a manifest inadvertence.

Chaffe vs. *J. T. Ludeling*, 962.

Where a judgment creditor, adjudicatees and sheriffs are joined in a suit to annul the judgment and the sales and to recover damages *in solido*, there is a misjoinder, and an exception setting up the same should be sustained.

Cane vs. *Sewall et al.*, 1096.

An allegation by a party in an injunction suit, touching the value of movable effects seized as the property of another party, will not estop the same plaintiff from alleging and proving a different value of the same property in another and distinct suit.

The determination of the value of such property is within the judicial discretion of the lower court, and the Judge thereof will not be guilty of contempt for entertaining jurisdiction of the second suit, because he had been prohibited from entertaining jurisdiction of the first suit, in which it appeared that the value of the property involved in the first suit exceeded his jurisdiction.

The State ex rel. Vinet et al. vs. *Judge, etc.*, 1151.

A party will not be heard to contradict and go behind the express jurisdictional allegations of his own petition, for the purpose of ousting the appeal of his adversary who, in good faith, has accepted and acted upon the same.

The State ex rel. Breaux et al. vs. *Judges, etc.*, 1220.

PLEDGE.

It is now well settled in our jurisprudence, that the property held in pledge by a creditor, may be seized from his possession by another creditor of the pledgor, and that the said pledgee cannot, by injunction, arrest such seizure.

J. H. Horner vs. *Dennis, Sheriff, et als.*, 389.

Where notes are pledged to a bank before maturity, to secure the note of the pledgor, the extension or renewal of the pledgor's note at its maturity, by substituting a new note, with interest paid in advance, in the ordinary manner of banks, does not extinguish the original obligation or the pledge securing the same.

The new note furnished in renewal of the old was but a continuance of the same obligation, and did not operate a novation, or release, or impair the effect of the original pledge in absence of proof of such intention. 6 M. 430; 4 R. 493; 6 R. 443; 24 An. 193; 1 Evan's Pothier, No. 559; 4 Marcadé, No. 778.

Union National Bank vs. *Slocomb*, 927.

PLEDGE—*Continued.*

The purchaser or pledgee of negotiable instruments after maturity, whose rights are derived from one who was not the owner and who was not authorized to sell or pledge, acquires no title or right thereto or thereupon, as against the true owner. And this principle applies equally to public securities past due, such as coupons of State Bonds.

Stern Bros. vs. *Germania Bank*, 1119.

POSSESSORY ACTION.

The evidence shows that plaintiff has had actual possession of the land for more than a year, and was evicted within a year prior to the institution of the suit: it is all that the possessory action requires.

Mrs. C. Young vs. *R. Wilson et als.*, 385.

The plaintiffs in this case are, under the title exhibited by them, only "tenants at will," and as such cannot institute the possessory action.

Sallabah and Wife vs. *J. B. Marsh*, 1053.

PRACTICE.

When a case is called for trial, and two attorneys for plaintiff are present and ask a continuance, on the ground of the absence of another attorney, represented as the leading counsel, and on refusal of the court to continue the case, they withdraw from the case without taking an exception, and the case is tried, and judgment is rendered for the defendants, without mentioning the absence of the plaintiff, and the defendants had set up a defense which could have made the basis of a direct and independent action, a judgment can be rendered on the merits of such defense.

Mrs. Nugent vs. *Mrs. Stark, etc.*, 628.

Under a decree remanding a cause to be tried anew, without limitation as to the scope of the new trial, the Judge *a quo* did not err in ruling that the case was open on all issues, whether original or supplemental.

Eskridge vs. *Farrar, Agent, etc.*, 709.

An exception as to the right and capacity of plaintiff to sue and stand in judgment, comes too late after default.

Parish St. John the Baptist vs. *Schexnaydre*, 850.

In a cause which requires the investigation of long and intricate accounts, in which the lower court did not appoint auditors, the Supreme Court will remand the case for the purpose of submitting the investigation of its accounts to auditors, under Art. 443, C. P.

J. H. Breen vs. *A. Downey*, 1217.

The failure to call one's vendor in warranty will save the latter from all the costs of court, except for service of original process.

Shantz and Wife vs. *Stoll*, 1237.

PRESCRIPTION.

Payment of a note given as collateral security of an open account, which extinguishes such account, cannot be imputed on mortgage notes of the debtor, given as security for another account due by him: where such imputation is made on the notes, it will not interrupt prescription on them. The creditor will be debarred in a suit on them by that defense.

C. L. Walmsley & Co. vs. *H. H. Morse*, 262.

A suit for damages for an illegal attachment, brought on the bond, though the latter, under the law, was made payable to the clerk of court, and the plaintiff in the action for damages was only an intervenor in the attachment case, is a claim *ex contractu* and, therefore, not prescribed in one year.

E. L. Levasseur vs. *L. H. Gardner & Co.*, 264.

An opponent suing on a note indorsed by the deceased must show protest and notice before he can recover. Claims for money loaned are prescribed by three years. Neither can oral testimony be received or considered, nor can entries of the creditor, unsigned by the debtor, have effect to prove an interruption of prescription against a deceased person. The judgment obtained by a creditor against a succession representative is equivalent only to a recognition by the latter. Its effects are to interrupt prescription, to give the creditor the right of intervening in the succession, but it does not conclude the creditors of the succession. In a *concurso* in an insolvent succession, such judgment creditor is bound to prove his claim when assailed.

P. Coyle vs. *Succession of Creevy*, 539.

This is an action to annul a will, the order probating it, the appointment by codicil of an executor, and the sale of the succession property. Such an action is prescribed by five years.

Heirs of Miller vs. *Ober et al.*, 592.

The right of passage through an alleyway, granted for the common benefit of abutting lots, is prescribed and lost by non-user during ten years. The alley is not a *locus publicus*, and the prescription set up is not one *acquirendi causa*.

Mrs. Thompson et al. vs. *Meyers et al.*, 615.

A verbal acknowledgment of a debt made to any person, whether in the presence of the creditor or not, will interrupt prescription.

Utz vs. *Utz et al.*, 752.

In an action to rescind a sale, based exclusively on the failure of the vendee to pay the last of two instalments of the price, and when the debt due for the prior unpaid instalment has been extinguished

PRESCRIPTION—*Continued.*

by the voluntary remission of the vendor, the action is only barred by ten years from date of default in payment of the last instalment.

J. D. Edwards vs. *J. T. White*, 989.

The judgment of homologation of the account of an administrator, showing a balance of money due by him, is prescribed after ten years, and the debt extinguished, whether said account was advertised as an annual or final one, when, in fact, it was a complete account of administration.

Walling Heirs vs. *Succession of Howell*, 1104.

The confession of judgment by the executrix in this case, is considered by the Court as an acknowledgment of the debt of the estate, and prescription does not run against debts thus acknowledged, whilst the estate is being administered.

The note given by the executrix in lieu of the one of the decedent held by the creditor, is an acknowledgment of the debt of said executrix.

The rule that executors can neither create liabilities nor change the nature of such liabilities of the estate as already exist, is also re-affirmed in this case.

Succession of A. Mansion, 1246.

PRINCIPAL AND AGENT.

By order of the General commanding the Department of the Gulf, during the late civil war between the States, the defendant Bank paid to an officer designated in the order, a certain balance due to one of its depositors. *Held*, that the depositor, not having repudiated the action of the Bank within a reasonable time after knowledge of it, (nine years in this case) must be presumed to have acquiesced in the settlement thus made of the said balance, and has no right of action to recover it. The payment was made, in the premises, in Confederate money.

H. S. Bennett vs. *Bank*, 150.

An agent has no power to bind a firm or the members thereof, by a confession of judgment where no attempt was made, at the time the judgment was thus obtained, to prove his agency.

An agent of a firm, even if his power had been proved, could not, by a confession of judgment, bind the individual members thereof.

The judgment is therefore an absolute nullity, which can be set up by the firm, as well as the members who were not cited in an action to revive.

A judgment cannot be revived which never existed.

E. Conery vs. *Rotchford, Brown & Co.*, 520.

PRINCIPAL AND AGENT—*Continued.*

Agents are not liable to third persons for non-feasance, or mere omissions of duty. They are responsible to such parties only for the actual commission of those positive wrongs, for which they would be otherwise accountable in their individual capacity, under obligations common to all other men. The doctrine, under the common and civil law, does not differ on that subject.

Delaney and Wife vs. *Rochereau & Co.*, 1123.

An agent is responsible to his principal for the acts of his sub-agent.

A bank, which receives in pledge as security for a loan and undertakes to collect for another party Havana lottery tickets which have won prizes, and consigns them to its own correspondent for collection, is responsible to its principal for the amount of commission which its correspondent or agent has overcharged for the collection of such values.

Under such a contract, the bank is held to a prudent administration of its principal's interest, and must see at its peril that the commission charged by its agent does not exceed the customary rates of commission established by usage in the place where the collection is made.

Masich vs. *Citizens' Bank*, 1207.

PRIVILEGE.

When payment of a sum due by a vendor, is assumed by a purchaser as part of the price of sale, the creditor whose debt is thus assumed is entitled to claim the vendor's privilege when seeking payment of his debt.

De L'Isle vs. *Succession of Moss*, 164.

Act No. 96 of 1877, which provides for the limitation to three years, of the privilege attaching to taxes, does not affect the mortgage securing such taxes.

Act No. 77 of 1880, which provides for the limitation to three years, of all tax mortgages and tax privileges, only applies to future taxes.

The State ex rel. Mrs. Jackson vs. *Recorder, etc.*, 178.

When a vendee redeems property sold, from forfeiture to the State, by paying the taxes due thereon, he cannot set up against this unpaid vendor that his privilege and mortgage have been extinguished by the forfeiture.

The privilege was dormant and revived. The debtor cannot keep both the property and the money.

People's Bank vs. *Ballowe*, 565.

A privilege cannot be recognized by the Court where there is no prayer asking for its recognition.

Schmidt & Ziegler vs. *Kent et al.*, 816.

PRIVILEGE—*Continued.*

A party holding the builder's privilege, duly recorded, does not lose the benefit of such privilege, where the property has been subsequently mortgaged, and after the death of the privilege and mortgage debtor, has been sold without a separate appraisement of the land and building, before the sale.

Such appraisement may be made *after* the sale, and the privilege creditor is entitled to be paid out of such sale in preference to the mortgage creditor.

Succession of F. Lenel, 868.

A privilege recorded after the death of the debtor cannot affect the creditors of his insolvent estate, whose rights become fixed as they exist at his death.

Succession of A. C. Rhoton, 893.

Registry of a note for "balance due on three boilers furnished the Souvenir Plantation," is sufficient to preserve the vendor's lien.

The time when the vendor's lien was recorded is no matter to a subsequent purchaser, if it was recorded before the subsequent purchase.

A mortgage creditor who buys the mortgaged property at private sale, and whose mortgage is, therefore, extinguished by confusion, cannot, as creditor, contest existing liens on the property.

This Court will take judicial notice of the fact that the common law is established in the other States of the Union, and that under that system, the vendor's privilege upon movables is not recognized; but the case is remanded for further evidence to show where the contract of sale was passed.

McIlvaine & Spiegel vs. Mrs. Légaré et al., 923.

The fact that the price paid by the third possessor for the property was applied to the payment of taxes therein, does not entitle him to subrogation to the lien and privilege of the State and Parish, as against prior mortgage creditors. The payment of the taxes extinguished them and the liens and privileges by which they were secured; and they no longer exist as a claim ranking that of plaintiffs.

Chaffe vs. *J. T. Ludeling*, 962.

A vendor's privilege on an immovable must be enforced, even when the act creating it was not recorded on the day that the contract was entered into, if no other creditor has acquired a mortgage on the property affected thereby. As to all other third persons, the privilege is valid from the date of the recording of the act creating it.

Succession of Louise E. Clay, Wife, etc., 1131.

PROHIBITION.

Where it appears from the record that the lower court had jurisdiction *ratione materiæ et personæ*, and the proceedings were regular, a writ of prohibition will not issue from the Supreme Court on an application based on the ground that the lower court had usurped jurisdiction and authority, by rendering a judgment against the law governing the case.

The State ex rel. Berthoud vs. *Judge, etc.*, 782.

PUBLIC ADMINISTRATOR.

The mere fact of temporary absence from the State of the surviving wife or heirs of the deceased, gives the Public Administrator no right to administer his succession.

They were in the present case seasonably represented.

Succession of Longuefosse, 583.

The intervenor has failed to establish her identity, hence, her claim to administer, in preference to the Public Administrator, must fall.

Succession of Berfuse, 599.

The Public Administrator for the Parish of Orleans, has no authority in law to provoke the removal of an executor or administrator of a succession.

This right is restricted by law to an heir, a creditor or a legatee.

The right of the the Public Administrator to claim the administration of a succession accrues only in case of an existing vacancy in said administration.

Succession of John Burnside, 728.

PUBLIC OFFICERS.

Oppositions to applications made to the Governor for the cancellation of bonds of public officers, are required to be referred to a competent court. When so referred, they must be tried without any new pleadings. The form of the proceedings is authorized by law. Issues are thus presented. A mandamus lies to compel the District Judge to proceed with the trial of such proceeding.

The State ex rel. Isaacson et al. vs. *Judge, etc.*, 74.

The salary of plaintiff as Administrator of the City being fixed by law, could not be reduced or remitted by a resolution or other action of the City Council, to which he did not assent.

Behan vs. *City of New Orleans*, 128.

When an officer claims an office as having been commissioned thereto, to fill a vacancy occurring therein, in a stated manner, and the defendant sets up title to the office as he would have done in a direct proceeding, the Court is authorized, under the pleadings, to pass upon the respective titles of both parties, and to adjudicate the property to whomever is entitled to it.

PUBLIC OFFICERS—*Continued.*

Where an officer, elected at the first general election under the present Constitution, who is required to give bond, and not being protected by exceptional legislation, does not furnish such bond within the thirty days following the reception of his commission, he is to be considered as having forfeited all rights to the office, which becomes vacant, and the Governor has the right to fill the vacancy thus created.

The State ex rel. Lemonnier vs. *Beard*, 273.

In order to recover against public officers having the control and distribution of public monies, for non-payment of a debt liquidated by a judgment against the corporation, to force which a mandamus was granted and which was placed on the budget of expenditures, it is necessary to prove that the fund required to pay was raised, that it was diverted, and that the creditor has sustained loss and injury.

Virginia Jones, Administratrix, vs. *Currie et al.*, 1093.

PUBLIC USE.

The dedication of property to public use needs not be made in express terms.

In case of doubt as to the extent of the property dedicated, the contemporaneous and subsequent continuous construction of the dedication put upon it, or accepted by both the public and the former owners of the property, should serve to remove the doubt.

A municipal corporation may alienate, or change the use and destination of public places, when authorized to do so by the legislature, in view of the public interest.

A. McNeil vs. *Hicks & Howell*, 1090.

RECONVENTION.

A motion in this Court to strike out claim for damages in intervention comes too late after issue is joined.

A reconventional demand need not be equally liquidated with the one to which it is opposed.

Our law does not authorize the appointment of a commissioner by the court to whom the books and papers of a commercial house, one of the litigants, must be delivered for examination.

Books and papers must be examined in court, and when the party whose books or papers are required resides in another parish, he may furnish sworn copies of them, which will be sufficient.

Where there is no dispute as between intervenor and defendant, relative to intervenor's claim, the latter can reconvene and recover damages against plaintiff, without citing defendant or joining issue as to him.

L. B. Cain vs. *E. Pullen*, 511.

RECUSATION.

The recusation of a judge *proprio motu*, when such judge is asked an appeal from a judgment rendered in a case in which he acted as counsel for the application, is proper and legal.

The appointment of an attorney in such a case to grant the order, is allowed by law. When the record does not show that such attorney has taken the oath required by the Constitution from all officers, it will be presumed to have been taken. *Affidavit* in this Court to the contrary will not be noticed.

Mrs. Nugent vs. *Mrs. Stark, etc.*, 628.

REGISTRY.

The registry of the judgment rendered on a mortgage note, in this case, was not a sufficient reinscription of the original mortgage, as the judgment did not contain and when registered did not convey all the necessary information for the purpose of the reinscription.

Miltenberger & Co. vs. *Dubroca, Recorder*, 313.

REMOVAL TO U. S. COURT.

The motion to remove the case to the Circuit Court of the United States was properly refused, for the reasons given in the case of Stafford vs. Twitchell, 33 An. 525, which are affirmed.

C. Gillespie et al. vs. *Twitchell et als.*, 288.

A contest involving the removal of an executor or administrator of a succession, and the appointment of another, is a mere incident in the settlement of the succession, and not a distinct and separate suit; neither does it fall in the designation of cases at law or in equity between parties of different States, of which the Federal courts have concurrent jurisdiction with the State courts.

Hence, an application by a party residing in another State for the removal of *such a contest* to the Federal court will not be granted.

Succession of John Burnside, 728.

RES JUDICATA.

A judgment sought to be annulled cannot be opposed as *res adjudicata* to the action of nullity.

If, however, the only ground alleged for annulling said judgment be *error* of decision upon the issues involved, the decision upon those issues by a competent court operates as a conclusive estoppel between the parties before the Court.

In absence of fraud or collusion minors, properly represented, are bound by a judgment as fully as if they had been majors and personally cited.

Matters once determined by a court of competent jurisdiction, if the judgment has become final, can never again be called into question

RES JUDICATA—*Continued.*

by the parties or their privies, though the judgment may have been erroneous and liable to certain reversal on appeal.

This estoppel extends to every material allegation which was at issue in the cause and was therein determined.

Heroman et al vs. *Institute Deaf and Dumb*, 805.

Judgments homologating tutorship accounts and settling legal mortgages on the tutor's property, have not the force of *res adjudicata* against third possessors or special mortgage creditors, but are, as to them, at most, *prima facie* evidence.

When a direct conflict arises between such a judgment and the claims of such third persons, in a *concursus* for the distribution of funds, involving the necessity of settling immediately the ranks of opposing claims, they will not be remitted to an action of nullity, but may contest then and there the validity and rank of the claim allowed by the judgment.

Succession of Drauzin Triche, 1148.

A judgment of ejectment of a party as a tenant by a Justice Court will not sustain the exception of *res judicata* in an action by the party ejected, for possession *as owner* of the same premises.

Mrs. Huyghe vs. *H. Brinkman*, 1179.

REVIVAL OF JUDGMENT.

In a suit of revival of judgment, the defendant cannot raise any defense short of the absolute nullity of the original judgment for want of citation or such other radical defect.

Mrs. L. A. McCutcheon et al. vs. *J. B. Askew*, 340.

Prescription of a judgment may be interrupted by other modes than a suit in revival of the judgment.

Citation in a suit of revival, though issued from an incompetent court, has the effect of interrupting the prescription of a judgment.

Acts No. 28 of 1875 and No. 29 of 1879, imposed no such penalty as the destruction of judgments in cases of which the records were not re-established in the manner provided for by such statutes.

In suits of revival the burden of proof rests on the defendant, to show that the judgment sought to be revived was absolutely null.

L. L. Levy vs. *W. L. Calhoun et al.*, 413.

In order to revive a judgment rendered against a succession, which was unrepresented at the time the suit to revive was instituted, a citation of the heirs, who have not renounced the succession, is sufficient to maintain the action.

Burbridge & Co. vs. *Mrs. Chism, etc.*, 681.

A suit to revive a judgment against a defendant since deceased, is properly brought against the legal representatives of his succession.

REVIVAL OF JUDGMENT—*Continued.*

A citation addressed to the *executor* of a succession, is substantially a compliance with a prayer for citation on the legal representatives of said succession, and is addressed to the defendant in the capacity set forth in the petition.

Under the requirements of Art. 312, Code of Practice, the plaintiff, in seeking to revive a judgment by citation on the legal representatives of a succession, must prove the capacity of the alleged legal representatives.

Mrs. Beall vs. *Succession of Elder*, 1098.

REVOCATORY ACTION.

The suit of a creditor of the husband to have the transfer made by the latter to his wife, in payment of her rights, rescinded and annulled, on the ground of fraudulent simulation, cannot be viewed in any other light than that of the revocatory action, and is prescribed in one year.

Succession of Britto vs. *Succession of Fabre*, 347.

In an action *en déclaration de simulation*, it is incumbent on the plaintiff to allege and prove fraud and simulation, unless it appear from the evidence that the vendor has retained possession of the property purported to be transferred. In that case, under proof of the insolvency of the vendor and of injury to the complaining creditor, shown to be a creditor at the time of the alleged simulated sale, the burden is on the defendant to show and establish the reality of the sale.

W. Nieman vs. *M. & M. J. Condran*, 847.

The Articles of the Code, establishing a presumption of fraud against contracts entered into between an insolvent debtor and his creditor, or other person having knowledge of his insolvent circumstances, do not constitute such insolvency and knowledge, as the *only* grounds upon which contracts in fraud of creditors may be revoked, and do not exclude other evidence of fraud and collusion, and do not control the broad principle established by the Code, that every contract may be the object of the revocatory action, which was made with the common purpose, on the part of both parties thereto, of defrauding creditors, and which actually does injure and defraud them.

Thompson & Co. vs. *Freeman et al.*, 992.

SALE.

When a party, before buying, knows of the defect of his own vendor's title, he is not entitled to withhold or suspend the payment of the price, nor demand security against eviction, if he be threatened therewith, on account of such defect.

T. Harang vs. *Blanc et al.*, 638.

SALE—*Continued.*

The clause in an act of sale restricting warranty to troubles, evictions, etc., "arising from the acts and promises of the vendor *only*, is equivalent to a stipulation of no warranty against troubles, evictions, etc., arising from the acts or promises of others than the vendor.

The mere stipulation of no warranty exempts the vendor from liability for fruits or revenues, cost or damages, in case of eviction of the buyer; but he remains bound for restitution of the price, "unless the buyer was aware at the time of the sale, of the danger of the eviction, and purchased at his peril and risk."

The buyer who accepts a sale with stipulation of no warranty, knowing at the time the danger of eviction, is held, by implication from those acts, to purchase at his peril and risk, and cannot, therefore, sue for the restitution of the price; and it is not necessary that the act should contain an express stipulation that the buyer purchases at his peril or risk.

It is essential, however, that the vendor, in order to escape liability to the evicted purchaser for restitution of the price, should affirmatively establish actual knowledge by the latter of the danger of eviction, either by direct proof, or by implication from references to, or proof of collateral facts so strong, as to be equivalent to direct proof.

Mere reference to the conveyances through which the vendor's title was derived is not sufficient, unless the titles referred to have infirmities so patent on their face as to be equivalent to notice.

The fact that the vendor's title was derived, mediately, from a syndic's sale, is not of itself sufficient to affect a buyer with knowledge of the danger of eviction.

N. O. & Carrollton Railroad Company vs. *Jourdain's Heirs*, 648.

Where a contract states that A has bargained, sold and delivered to B a certain plantation, describing it, together with everything on the place, "the titles to said property (real and personal) to be made at their convenience, as per their private agreement," the contract is not a sale, but a mere agreement to sell.

In default of compliance, on the part of the contingent purchaser, with the conditions imposed by private agreement upon him, he acquires no title, and nothing immovable by destination can be seized as the property of the conditional purchaser by his creditors.

Broadwell vs. *Raines, Sheriff, et als.*, 677.

When a thing has been exchanged for another thing and a sum of money, the contract is a sale to the extent of the money consideration, and when credit is given for the latter, the creditor is entitled to a vendor's privilege.

Succession of Furniss, 1013.

SALE À LA FOLLE ENCHÈRE.

In order to hold an adjudicatee, who refuses to comply with his bid, responsible in damages, under a sale *à la folle enchère* under Article 2611 of the Civil Code, the property offered at the second offering must be identical in substance and in description; the conditions must be the same and on the same terms as they were at the first offering. 14 L. 559; 3 R. 401; 4 An. 242.

Any change or variance in the quantity of property, or of the terms and conditions of the sale, will vitiate the second sale, and will operate a release of the delinquent bidder from all damages in the premises.

E. Z. Labauve, Administrator, vs. *P. McCabe,* 183.

SEIZURE.

The defendants, an ex-sheriff and his sureties, are not liable for the rent of productive real estate, situated in the Parish of Orleans, while under seizure, when the same is occupied as owner by the defendant as his residence, and where the Sheriff has authorized the plaintiff to use his name for all useful purposes, and the plaintiff has declined the offer.

Mr. and Mrs. Conte vs. *Handy, Sheriff, et al.,* 862.

A party signing a twelve months' bond is not permitted, when execution issues thereon, under Article 720, C. P., to arrest the writ, on the ground that there was no seizure, advertisement and sale of the property in the case in which the bond was furnished, the bond reciting that all the requirements of the law had been complied with. By signing the bond, such party has cured all the irregularities, if any existed. 7 An. 542; 12 Rob. 209; 9 Rob. 185; 34 An. 205.

Mrs. Bracey vs. *Sheriff et al.,* 997.

SEPARATION FROM BED AND BOARD.

In a suit for separation from bed and board by the wife, a new trial will not be granted to the husband on the ground of newly discovered evidence of the wife's adultery, in the absence of any allegation to that effect in his answer and reconventional demand.

To constitute public defamation in the sense of Article 138 of the Civil Code, it is not necessary that the offensive epithets or words be uttered in public. It is sufficient that they be addressed to the other spouse in the presence of third persons, or spoken to other persons in the absence of the party affected thereby.

A reconciliation of the spouses, after ill-treatment or public defamation, will not be a bar to an action for separation from bed and board, if the acts or causes are renewed after such reconciliation, the former acts will corroborate the new action.

Cass vs. *Cass,* 611.

SERVITUDES.

Servitudes may be proved by parol when they are based *on prescription*, but *not otherwise*, though parol is admissible to establish the *character* of an alleged title, without regard to the validity or effect of such evidence.

A continuous apparent servitude may be acquired by prescription of ten years.

S. H. Kennedy vs. *Succession of McCollam*, 568.

In establishing a servitude upon a strip of ground for an alleyway, the ground being described not only by boundaries but the dimensions in feet being also stated, and the proof being that the alley had never extended beyond the number of feet stated, and was only of that extent and dimensions when the servitude was created, *held*, that such sale was not *per aversionem*, and the servitude existed only upon the ground to the extent enumerated in the act of sale, since it conformed to the quantity actually devoted to such use at the time of sale.

Servitudes not being susceptible of actual delivery, the use which the owner of the estate makes of them determines their extent.

Widow Ledoux et al. vs. *West*, 1184.

SUBROGATION.

A subrogee has the necessary interest to procure the revocation of an order rescinding, *ex parte*, a decree of subrogation in his favor, and the reinstatement of the same.

On the trial of a rule to that end, oral testimony is inadmissible to contradict the title on which the subrogee relies to be recognized as the owner of the entire judgment, when that title shows that another person has a half interest in it.

Even if such other person had no such interest, the subrogee could not, on the face of the deed presented, have himself recognized or subrogated to the whole judgment.

If the half interest mentioned was a litigious right, and was acquired in violation of law, by a practicing attorney, the right of ownership would not be in the subrogee, but in the original judgment creditors.

Buck & Beauchamp vs. *Blair & Buck*, 767.

SUCCESSIONS.

It is no reason for the executors to refuse to put the heirs in possession, that the latter have not tendered the amount of the debts, fees and charges due by the estate. The objection is frivolous. If the creditors make no opposition and require no security, the executors have no right to demand any. For the fees and charges, they must provide for them in their account.

SUCCESSIONS—*Continued.*

The consent of the legatees that the heirs be put in possession, is a waiver of the tender of the legacies.

It is enough for the court to order the heirs to be put in possession that the constituted legatees consent to it. Whether such constituted legatees have the power or not to so consent, is not to be considered in the premises. The putting of the heirs in possession decides no issue as to the legality or validity of the legacies. All the claims and rights that can be exercised under such legacies against the executors, can be equally exercised against the heirs, after they have been put in possession.

Succession of Robert Y. Charmbury, 21.

When the natural tutrix administers the estate of her deceased husband as administratrix, without opposition from the creditors, she can legally mortgage the property of the estate by order of the Probate Court, on the advice of the family meeting, and the third person holding such mortgage shall be protected.

Succession of N. A. DeLerno, 38.

When the succession of a party has been opened and heirs have been recognized by a competent Court, the judgment raises a presumption of death, which it is incumbent on the party represented to be dead and claiming to be living, to destroy. The evidence in this case establishes that the plaintiff, who was represented as dead, is living, The proceedings made for the settlement of her estate were properly annulled.

Rachel vs. *Jones et al.*, 108.

Where succession property has been sold to pay for work done for its preservation, and the sale is made under the directions of the executor of the deceased and of co-owners, and the fact of the sale is afterwards mentioned in the final account presented and homologated, and the succession is notoriously and perfectly insolvent, the judgment of homologation concludes the heirs. The latter are not entitled to citation in such cases and cannot ask the nullity of the sale of the property.

E. Lesseps vs. *Lapène et als.*, 112.

When one of two executors is not entitled to his commission, because he is a legatee, the other executor should only receive the one-half of the two and a half per cent. commission.

An executor is entitled to his commission upon the whole amount of the property administered by him.

Succession of Edwards, 216.

After a succession has been closed by the homologation of the final account of the administrator, and by the judgment putting the

SUCCESSIONS—*Continued.*

heirs in possession, the Court of Probate has no jurisdiction of a suit in partition, to divide the property between them. The jurisprudence of the State must be considered settled on this point.

C. Gillespie vs. *Twitchell et als.*, 288.

The will of the husband, who left no forced heirs, having bequeathed the usufruct of his share of the community property to the wife, giving her at the same time the right to sell the said property itself, the wife, accordingly, sold such property and bought it in herself, at the public sale. *Held*, that she acquired by this purchase all the rights that any other purchaser would have acquired, and that she could convey a valid title to the property.

The Parish Court could legally authorize a married woman, in the absence of her husband, to purchase property of the value of more than $500.

Heirs of Michel vs. *Knox et als.*, 399.

A special legatee is entitled to the interest, without proof of his having demanded payment, when the executor has himself asked for and obtained an order of Court to sell property of the estate for the purpose of paying such legacy.

Ventress, Executrix, vs. *Brown et als.*, 448.

The enforcement of the penalties provided by law against executors for failing to present their accounts, to deposit money in bank, and to obtain proper authority to pay debts, is a matter within the sound discretion of the Court.

In the case at bar, the Court sees reasons, in the conduct of the executors, not to inflict such penalties.

Congregation St. Mary, etc. vs. *Farrelly et al.*, 533.

An order of sale made at the instance of the administrator of the succession of a deceased husband will not be revoked, when an order of seizure and sale was previously issued and executed against the widow in her individual capacity as owner of the property.

The subsequent making of the heirs of the deceased parties without obtaining an order of seizure and sale and effecting an actual or constructive seizure, previous to the rendition of the order of sale in the mortuary proceedings, will not divest of jurisdiction the court which gave that order.

P. Morere vs. *T. L. Preston, Administrator, etc*, 873.

Succession property was offered for sale in this case by the sheriff, and the appraisement price not being bid, the property was *instantly* re-offered and sold on a twelve months' bond. The surety on such bond is held liable under the circumstances of the case, how-

SUCCESSIONS—*Continued.*

ever irregular the sale, which was voidable, but not absolutely void.

Succession of P. G. Quinn, 878.

In a testate succession the commission allowed to the testamentary executors shall not be charged so as to affect the legitime reserved to the forced heirs.

The executors cannot claim, in addition to their commission allowed them by law on the amount of the inventory, any additional commissions on collections made by them for rents or other debts due the succession.

A clerk in the employment of a merchant at a fixed salary, cannot be allowed an additional compensation against the succession of his former employer for services rendered in the general management of decedent's business, without proving an agreement to that effect between the deceased and himself.

Succession of J. A. Turnell, 888.

In a contest between the creditors of an insolvent estate, the mere production of a contract of lease for a term of years, is not of itself sufficient to establish the intestate's liability, as against other creditors, for rent during years which *preceded* that of his death.

Parol evidence is not admissible to impeach the validity of a judgment regular in form, rendered by a court having jurisdiction.

Money deposited in a bank by a firm to the credit of the intestate, their principal, previous to his death, becomes, at his decease, an asset of the succession and cannot be withdrawn by the administrator, one of the firm, and treated as belonging to said firm.

An administrator should be allowed commissions on sales of cotton, belonging to the succession, made by the factors of the intestate, although said administrator be a member of the factor's firm.

The administrator has no right to complain of the rejection by the lower court of a claim made by one of the creditors, nor make it the ground of an appeal, when the alleged creditor neither complains nor appeals.

Succession of A. C. Rhoton, 893.

A sale of succession property, prayed for in order to pay the debts and to settle the various claims against the estate, by the administrator of a succession in which there are minors, and ordered by the court for the purpose of paying the debts, for the settlement of which the administrator has no available funds, is a sale to pay debts, and is valid as such.

If, at such a sale, the tutrix being instructed by a family meeting to purchase for the minors property to the extent of their interests, buys property, which is adjudicated to her personally, without

SUCCESSIONS—*Continued.*

reference to her capacity, the property will be held not to have been purchased for the minors, even if the auctioneer's return is signed by the tutrix in her capacity as such.

Heirs of Nesom vs. *Weis et al.*, 1004.

Where the property of a succession is sold at judicial sale, provoked by a creditor, the administrator of such succession, even though he be competent to buy at the sale, cannot lawfully make an agreement with another person, who intended bidding at the sale, that if he will not do so, he, the administrator, in case the property is adjudicated to him, will sell to such person a part of the property for a stipulated price. A purchase by the administrator under such circumstances is a nullity, and the title to the property will not pass from the succession. The buyer in such case is not a possessor in good faith, but owes rent for the property from the sale.

He is, however, entitled to reimbursement for taxes paid on property, for repairs, insurance, and such necessary expenses, also to be reimbursed the price paid by him that went to extinguish charges against the succession and interest thereon; but the settlement of his claims must be made contradictorily with the creditors and by the proper proceeding in the probate court.

It is the administrator's duty to obtain the highest price for the succession property, and not to depress it by preventing competition at the sale in order to buy himself.

When, after such purchase by the administrator, he mortgages a part of the property to a person who is in good faith, has no notice of the vice in the title, the mortgagee will be protected, and the property, upon the annulling of the sale, returns to the succession charged with the mortgage.

Chaffe, Administrator vs. *W. W. Farmer*, 1017.

The foundation of the right to bring a direct action against the administrator of a succession under administration, is the refusal of the administrator to acknowledge the debt and to place it on his tableau.

C. Vavasseur vs. *S. Mouton, Administrator*, 1044.

Where the heirs of an intestate have taken possession of his estate, the major heirs accepting purely and simply, and the minor heirs represented by their tutrix, an administration of the succession will not be ordered at the instance of a party who alleges that his wife is a creditor of the succession, where it is shown that the debt claimed, if ever due, was demandable for over twenty years.

Succession of Sarrazin, 1168.

Where a testatrix leaves one-fourth of her succession to certain collat-

SUCCESSIONS—*Continued.*

erals and next makes money legacies and special legacies of property in kind to others, leaving the remainder of her property, after satisfaction of the foregoing legacies, to her husband, the legatees of the fourth will be entitled to one-fourth of the whole assets after payment of the debts.

The legacies of money and property will be satisfied next, and the husband, as universal legatee, will take the residue.

Succession of Chedome, Wife, etc., 1239.

SURETY.

The sureties of a sheriff who have limited their liability when signing the bond, cannot be held responsible beyond the amount specified.

P. Marcy vs. *C. Praeger et als.*, 54.

TAXATION.

The title of Act No. 88 of 1880, conforms to Art. 29 of the Constitution; does not embrace more than one object, and expresses that object sufficiently.

The rice-flume tax authorized by Section 6 of Act No. 88, being a parish tax, conforms to the requirements of equality and uniformity, under Constitutional Article 203, being equal and uniform as between all persons of the class subject to the tax and within the limits of the authority imposing it. 29 An. 283; 26 An. 493; 27 An. 396.

J. Weise vs. *Thibaut, Sheriff, et al.*, 556.

Masonic societies are charitable institutions, within the meaning of Article 207 of the Constitution, and are exempt from taxation on property owned and used for their corporate purposes. But property of such institutions, when leased or used for corporate income, will not be entitled to the exemption.

The State ex rel. Bertel vs. *Board Assessors*, 574.

Defendants, as manufacturers, are exempt under Art. 207 of the Constitution, but, as dealers, which the evidence shows them also to be, they are liable for a license tax.

City of New Orleans vs. *LeBlanc, etc.*, 596.

Selling liquors by the drink is not part of the business of a confectionery, and is not covered by a confectioner's license.

When a confectioner sells liquors by the drink, he combines two kinds of business, and under the terms of the statute, is liable for a separate license on each.

New Orleans vs. *Jané*, 667.

The provisions of the Constitution of 1879, in regard to the method of collecting municipal taxes without suit, are not self-operative, and

TAXATION—*Continued.*

never having been vivified by legislative action, the former mode of collecting such taxes has been neither modified nor repealed; and all laws on that subject previously in force, continue in operation, if not otherwise abrogated.

New Orleans vs. *Wood & Bro.*, 732.

The Constitution prohibits any political corporation from imposing a greater license tax than is imposed by the legislature for State purposes, hence, such corporation cannot impose any such tax on a trade or calling not subjected to a State license tax by the legislature.

As travelling agents are not required to pay a license tax to the State, they cannot be held to pay a license to any political corporation in the State.

New Orleans vs. *H. L. Graves*, 840.

The exemption of the income of all persons up to $1,000, and of the household furniture of every one up to $500, applies equally and uniformly to all taxpayers, and does not violate the provisions of the Constitution of 1868, as interpreted by the court organized under that Constitution.

New Orleans vs. *Kennard, Howe & Prentiss*, 851.

A provision in the charter of a corporation exempting its "stock and real estate" from taxation, does not cover an exemption from *license* taxation. New Orleans vs. Canal Bank, 32 An. 104.

The grant of a charter to a corporation authorizing it to carry on a certain business during the term of its charter, does not import permission to do so, without contributing to the support of the government in like manner with natural persons pursuing the same business.

New Orleans vs. *State Bank*, 892.

Under a charter declaring that the property of the company shall be exempt from taxation for ten years after the completion of the road, the corporation cannot claim immunity from the beginning of its existence up to the completion of the road. Decision in 33 An. 622, affirmed.

Dennis, Sheriff, etc. vs. *Railroad Company*, 954.

The tax for the satisfaction of judgments, under R. S. Sec. 3354, is not taxation by judicial authority. The tax is to be assessed by the parish officers named in the Statute, upon whom the legislature confers the power and imposes the duty to assess such tax, and the function confided to the court is the purely judicial one of directing said officers to execute the legislative will. Affirming Plaquemines vs. Packard, 28 An. 199.

TAXATION—*Continued.*

In absence of special legislative provision, taxes are not subject to the prescription of three and five years.

H. T. Smith vs. *Huey et al.*, 1011.

A charge of a specified amount for the daily privilege of keeping a private butcher's stand is a license or tax. The power of municipal corporations to tax or license callings or occupations must be expressly conferred by law. Such corporations may, under its police power, regulate or suppress such private markets, but cannot, under such power, impose a tax for revenue.

L. Delcambre vs. *C. Clere*, 1050.

TAX SALES.

A tax sale will be annulled where the property was not assessed in the name of the real owner, but in that of another party, and where no notice or seizure was given to the owner.

LeBlanc vs. *Mrs. Blodgett, Executrix*, 107.

Tax sale declared null and void and set aside, for want of proper description of the property on the assessment rolls, and also, because some of the taxes for which the property was sold, were illegal.

A. Rougelot vs. *Quick*, 123.

Irregularities and defects growing out of any judicial or tax sale are as well cured by the lapse of five years, as by a judgment in a monition proceeding, and minors, married women and interdicted persons are concluded thereby.

Mrs. Roberts, etc. vs. *Zansler*, 205.

It is legitimate for parties claiming to be owners in an opposition to an application for a monition to homologate a tax sale, to attack not only the sale, but the title of the party from whom the property is claimed to have been acquired.

Where property has not been so described on the assessment roll as to be susceptible of easy identification, and has been assessed in the name of the heirs of a living person, the forfeiture thereof to the State for taxes is a nullity, and title cannot be made to it by the State.

Baton Rouge Oil Works, Monition, 255.

A radical defect in the assessment, as where the property has not been assessed in the name of the true owner, is such a nullity that it cannot be cured by prescription. The purchaser under such a title who has been evicted, is entitled to be reimbursed the value of his improvements and the taxes paid thereon, not including penalties and costs.

E. Davenport vs. *Knox et al.*, 407.

TAX SALES—*Continued.*

Act No. 107 of the Legislature of 1880, providing for the sale of the property forfeited to the State for unpaid taxes, was not intended to apply to future, but only to prior taxes.

The State ex rel. Ory vs. *Labranche, Tax Collector*, 538.

Where purchaser at tax sale has purchased property of A for a certain price, and paid over to the sheriff the amount of the writs, retaining in his own hands the balance, and afterwards, both the right of redemption, which A has by law, and all his interest in the property are seized and sold by a creditor in another proceeding, A no longer has any claim to the balance in the hands of the original purchaser, in fact no interest at all, as whatever he may have had has been sold.

F. Lacroix vs. *Stewart, etc.*, 639.

In a suit brought to annul a tax sale, the tax collector, having no interest, is not a necessary party.

Plaintiff being unable to determine the amount of the taxes due, through loss of the assessment rolls, is relieved from making a tender, as a condition precedent to an action for the recovery of the property.

Plea of prescription of three years no bar to an action to annul a tax sale for direct violation of prohibitory law. It is a bar only to actions for *informal* or *relative* nullities.

Where tax sale was made in direct violation of a prohibitory law, the sale is an absolute nullity.

This being a case involving the interpretation of a statute, we consider the purchaser, though the sale be a nullity, in good faith.

This Court will follow the wise rule of *stare decisis*, in regard to two decisions of this Court interpreting Act 7, Extra Session 1875, though probably erroneous.

Wederstrandt et al. vs. *Freyhan*, 705.

An adjudicatee at a tax sale cannot recover, in a petitory action, from purchasers of the same property at a judicial succession sale, where no tax deed is recorded at the date of the probate sale.

Tax collectors are bound to deliver a certificate of adjudication, vesting a defeasible title, for registry. In case of refusal they can be compelled to issue one. The Auditor's title, made two years after the sale, where the property is unredeemed, confers an absolute title confirmatory of the previous one by collector.

H. Meyer vs. *W. H. Fountain*, 987.

In a petitory action, the rule is well established that the plaintiff has the right to meet the title opposed to him, even when it is a tax sale, by all means of attack, as if specially pleaded.

TAX SALES—*Continued.*

It is equally well established, that parole evidence is admissible to prove simulation and fraud in the apparent acquisition of real estate.

E. Telle vs. *Fish et al.*, 1243.

Held, that the tax sale in this case was made under Act No. 77 of 1880, and that the mortgage creditor had the right to redeem the property.

Rondez & Pelas vs. *Buras*, 1245.

TRADE-MARK.

Suit based on infringements of a trade-mark.

The evidence establishes the proprietary interest of plaintiff in his trade-mark; also the medicinal properties of his bitters, and that he is not guilty of fraud in using the word "imported" on his labels.

The unauthorized use by other parties, of plaintiff's trade-mark, is no justification of defendant's acts of infringement; but, on the contrary, such circumstance is, under the authorities, one of aggravation.

Ludwig Funke vs. *Jos. Dreyfus & Co., etc.*, 80.

WHARVES.

This is a suit for wharfage dues claimed by plaintiff from defendants, in virtue of his wharf contract with the City of New Orleans.

The contract under which plaintiff sues did not transfer to him the right of collecting dues for wharfage or piers not built or furnished by the City.

As the wharf, for the use of which dues are claimed, is the property of defendants, they cannot be made to pay dues for the same.

Had the City herself brought this action, she could not have recovered, as she can claim compensation only when the wharves used are her own property.

Ellerman vs. *Morgan's Railroad Company*, 698.

WILL.

Where a will says: I give and bequeath to my wife property, *to have and to hold* during her natural life; *after her death* I give and bequeath the same property to my grandson, it is void as a prohibited substitution.

The first bequest constitutes an *imperfect ownership* for life, and not an usufruct.

The second bequest, by its terms, takes effect only after the death of the first legatee.

The charge on the first legatee "to preserve and return" need not be express, and here it is necessarily implied.

This case is distinguished from 31 An. 456, and similar cases. Roy vs. Latiolas, 5 An. 552, overruled.

E. E. Marshall et al. vs. *Pearce et al.*, 557